Supreme Court of the United States.

DECEMBER TERM, 1869.

No. 102.

CHARLES GIBSON, *Plaintiff in Error,*

vs.

PIERRE CHOUTEAU AND AL.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

CHARLES GIBSON, *Plaintiff in error,*
vs.
PIERRE CHOUTEAU AND AL. } *No.* 102.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes up under the 25th section of the judiciary act, by writ of error to the Supreme Court of Missouri.

The Pleadings.

On the 23d of September, 1862, the plaintiff in error brought an action of ejectment in the St. Louis Land Court against Pierre Chouteau, and John Cook, and Charles P. Chouteau, to recover 64 acres of land. Cook and Charles P. Chouteau disclaimed any interest in the land, and the action was abated as to them.

The petition states, and the answer admits, that the premises in dispute are a part of the U. S. Survey No. 2,498, in favor of James Y. O'Carroll or his representatives. (Rec., p. 1.)

The plaintiff averred in his declaration or petition, that Mrs. Mary MacRee was, prior to the 20th of August, 1862, invested by the United States with the title to said premises, and being so invested with the title thereto, conveyed the same to the plaintiff. (R., p. 1.)

The defendant, (Pierre Chouteau,) in his answer, denied "that on or prior to the 20th of August, 1862, the said Mrs. Mary MacRee was invested by the United States with the title to the premises sued for, or seized thereof." And thus issue was joined on this averment. (Rec., p. 4.)

The said defendant also averred in his answer that he had been in possession of said premises for forty years, and that the plaintiff was barred by lapse of time and laches from any relief either in law or equity; also, that the plaintiff had obtained and held any title vested in him in trust for the defendant. (Rec., p. 4.)

To these answers the plaintiff replied in due form. (Rec., pp. 6, 7.)

A jury was waived and the case was tried by the court.

The Plaintiff's Case.

On the trial of the case in the St. Louis Land Court, the plaintiff gave the following evidence:

1. A patent by the United States to Mrs. Mary MacRee bearing date and issued on the tenth day of June, eighteen hundred and sixty-two.

The preamble to the patent recites that a certificate, (commonly called a patent certificate,) number four hundred and ninety-four, "issued in pursuance of the New Madrid act of the 17th of February, 1815, had been deposited in the General Land Office." It also shows that Frederick Bates, Recorder of Land Titles at St. Louis, on the 30th of November, 1815, issued a certificate, (commonly called a New Madrid location certificate,) numbered one hundred and fifty, to James Y. O'Carroll, or his legal representatives, for six hundred and forty acres of land under said New Madrid act. And that Joseph C. Brown, for Christian Wilt, the legal representative of said O'Carroll, in said certificate located the same on the said tract on the 16th of June, 1818. And that said Brown officially, as Deputy United States Surveyor, had made a survey of the same in 1818. And also that there were several adverse claims to portions, but not all of said tract, and which are specifically mentioned in the patent. The patent then grants the premises to Mrs. MacRee by name as the assignee of said O'Carroll, in virtue of deraignment of title from him. It contains the usual clause re-

serving "such valid rights as may exist in virtue of the claims particularly designated," as well as "any other valid adverse claims, if any such should exist."

2d. A deed by Mrs. MacRee to the plaintiff, dated August 8th, 1862.

3d. The defendants admitted that Pierre Chouteau was in possession of the premises at the time stated, and the plaintiff proved annual value, &c.

The plaintiff rested here.

THE DEFENDANT'S CASE.

The defendant claimed to be the true owner of the equitable title upon which the patent was issued, and further claim that the legal title conveyed by the patent to Mrs. MacRee enured to and vested in him as the true owner *pro tanto* of the certificate of location, and, therefore, that he was the legal representative of O'Carroll, and in support of his claim gave in evidence sundry deed and judicial proceedings, which may be grouped as follows:

(A.)

New Madrid certificate 150 to James Y. O'Carroll, November 30, 1815. (Rec., p. 22.)

Location thereof and survey for C. Wilt, June 16, 1818. (Rec., p. 23.)

Return and approval thereof by Recorder of Land Titles and issue of patent certificate 447 August 16, 1841. (Rec. p. 102.)

(B.)

Sundry deeds purporting to convey title to C. Wilt prior June 16, 1818, (Rec., pp. 25, 37) viz:

1. Deed from O'Carroll to Ruddell, 1805. (Rec., p. 31.)

2. Deeds from Ruddell to Tanner, Gillespie, and Dameron, in 1818, 1816, 1815. (Rec., pp. 25, 28, 26.)

3. Deeds from Tanner, Gillispie, and Dameron to C. Wilt, 1816, 1818, 1816. (Rec., pp. 29, 30, 36.)

(C.)

Deeds, &c., purporting to convey title from Wilt to Chouteau, viz:

1. Proceedings in chancery in a suit by Hertzog against the infant heir of Christian Wilt in 1821. (Rec., p. 45)

2. A deed from the infant's guardian to Hertzog, September, 1821. (Rec., p. 39.)

3. A deed from Hertzog to Wash, in trust, 1822. (Rec., p. 48.)

These purport to convey the whole tract of 640 acres.

4. A deed from Wash to P. Chouteau, conveying 64 acres now in dispute, in 1824. (Rec., p. 51.)

(D.)

Deeds, &c., purporting to convey title from Wilt to Chouteau, viz:

1. Proceedings by Hertzog, as above, in 1821. (Rec., p. 45.)

2. Execution and Sheriff's deed to and in favor of H. Clay vs. Hertzog, in 1831. (Rec., p. 56.)

3. Decree in Clay vs. Wilt's and Hertzog's heirs, 1833. (Rec., p. 56.)

4. Deed from W. MacRee's heirs to Sam'l MacRee, July, 1836. (Rec., p. 59.)

5. Deed from Sam'l MacRee to P. Chouteau, August, 1838. (Rec., p. 70.)

6. Deed from H. Clay to Sam'l MacRee and others, October, 1839. (Rec., p. 58.)

(E)

Transfer of title from Wilt's heirs to Mary McKee, viz:

Chancery proceedings by Sam'l MacRee against C. Wilt's heirs, and decree transferring to him their estate in the land, June, 1848. (Rec., p. 69.)

Will of Sam'l McKee. (Rec., p. 80.)

Upon this evidence the defendant asked the Court to rule that if the documents were genuine, then the defendant had shown a title to the land in himself, which the Court refused. (Rec. pp., 91, 93, instruction No. 6.)

(For reasons in support of this ruling see Gibson vs. Chouteau, 39 Mo., 537, and full brief pp. 15, 18.)

The defendant also moved for a number of other instructions embodying two other propositions. (Rec pp. 91, 93.)

FIRST. That the patent under which the plaintiff claimed was void, or at least conveyed no title to Mrs. MacRee.

SECOND. That the action of the plaintiff was barred by limitations.

Refusing these, the Court gave the following instruction of its own motion.

"The effect of the patent issued by the United States to Mary MacRee, was to invest her with the legal title to the land in dispute; and the title vested in the plaintiff, through the deed to Mary MacRee, is superior to any title shown by the defendant to the land in question, under New Marid certificate No. 150. And said patent having issued to said Mary MacRee, within ten years next before the commencement of this suit, the possession of said defendant is no bar to the plaintiff's recovery."

January, 1865. C. B. LORD.

The Court then found a verdict for the plaintiff, and gave judgment in his favor. Rec. pp. 14, 94.

A motion was made for a new trial which was overuled. Rec. pp. 94, 5.

An appeal was taken to the Supreme Court of Missouri. (Rec. p. 95;) and that Court affirmed the judgment of the Land Court (Rec. p. 105.)

A motion was then made for rehearing upon a single question. (Rec. pp., 105, 108.) And after re-argument, final judgment was given for the appellant, the defendant in ejectment, without remanding the case. Rec. p. 106.

Questions before this Court.

The instructions asked in the Land Court raised three questions: 1, whether the patent was valid to pass the legal title to the plaintiff; 2. whether the defendant had the equitable title; 3, whether the plaintiff's action was barred by limitations.

These questions were determined in favor of the plaintiff by the Land Court; determined a second time in favor of the plaintiff by the same Court upon motion for a new trial; determined for the third time in favor of the plaintiff by the Supreme Court upon appeal; and then, as we hold, the exceptions raising the question as to the validity of the patent and the defendant's claim of title were expressly waived in the Supreme Court, before that Court gave its final judgment. And when that judgment was given the only question, before it was as to the statute of limitations, so that no question concerning the validity of the patent or the claim of the defendants to the equitable title are subject to examination here. They are not upon the record. They were expressly waived by the defendants before the Supreme Court of Missouri, before the final judgment was rendered in the Court. See motion for rehearing. (Rec. p. 108.)

The objections to the validity of the patent are abandoned on the defendants brief. "Both parties regard the patent as valid." (Mr. Hill's brief p. 12, top;) but they are fully answered in full brief pp., 11, 25.

The second question, as to the plaintiff's equitable title, cannot be examined here even if not waived below. It depends upon questions of local law; it was expressly decided by the Land Court and Supreme Court of Missouri upon the 6th instruction, (Rec. p. 91,) and in their opinion on this question neither Court could ever be brought to entertain "the least doubt." All the propositions made here in the briefs for defendant were fully presented to the Supreme Court of

Missouri, and fully decided adversely to the defendants. (39 Mo., pp. 547, 563, 564, 565, 566, 571, 573, 576, 578, 585, 586, 587.) Their decision upon this point will not be reviewed here. Rector vs. Ashley, 6 Wall, 142.

AS TO LIMITATIONS.

The patentee took by patent, in 1862, the legal title, and her grantee was entitled to recover the possession of the land. (Bagnall vs. Broderick, 13 Pet., 436; Fenn vs. Holme 21 How., 481.)

In Fenn vs. Holmes, 21 How., 488, this Court had under consideration the *identical equitable title upon which the patent to Mrs. MacRee issued*, and it was there held that no action at law could be maintained on that equitable title, that the fee was still then in the government of the United States, and that it would by the patent pass to the grantee, and that the patentee would be "entitled to enforce the possession in ejectment."

Holmes was then suing in the U. S Court If this suit had been brought in the same court, can it be conceived that the court would have held the plaintiff barred in a suit on the patent, because he had not sued ten years before? Yet the statute of limitations is as good a defence in one court as in the other.

The decision of the Supreme Court of Missouri declares that the remedy is gone, because suit was not brought to recover the possession in or prior to 1851—i. e., ten years before the patent issued, holding that by relation, the title must be held to have vested in the holder of the equitable title in 1841.

The doctrine of relation does not apply for this purpose, It is a fiction only resorted to to validate rights which otherwise would fail, and operates only between parties and privies. (Butler and Baker's case, 3 Coke, 25, 35.)

As to time it does not conclude the truth, if time be essential. (Cowp., 177.)

The fiction of relation is only intended to give the same protection at law that a Court of Equity would give. (French's Lessees vs. Spencer, 21 How., 240; Brown's Leg. Max., 54.)

The constitutional compact with Missouri provides that the State shall never interfere with the primary disposal of the soil, nor with any regulation Congress may find necessary for securing the title in said soil to the bona fide purchasers. (Mo. Const., art. X, sec. 1.)

The limitation acts relied on, of 1835 and 1847, as construed in this case, violate this compact by denying all remedy.

To deny all *remedy*, or materially abridge it, is to take away the *right*. (Bronson vs. Kinzie, 8 How., 311.)

But if the title related back, how far did it relate? The Court below held that it related back to the 16th of August, 1841, when the patent certificate 447 issued. But that certificate was set aside in 1847; "a thorough examination" was ordered into interferences, and "a proper plat and patent certificate" were directed to be returned. (Rec. pp. 79, 80.)

This was in the life time of Sam. MacRee, and before the present plaintiff had any connection with this matter. The proper plat and patent certificate were not returned till 1862, and the patent was issued on the new certificate No. 494, and not on the old one No. 447. The instructions of the Commissioner of the Land Office show that the change was made on no personal grounds, and certainly not for the benefit of O'Carroll's representatives. (Rec. p. 79.) Is it reasonable that the grantee of the United States should forfeit her land, by simply refraining from suing on her equitable title while, the Government was making an examination to determine whether the location she claimed had not been already disposed of to others?

The plaintiff does not, never did contend that the location certificate No. 150, or survey 2,498 were void. He insists that they were and always have been valid, but he does contend, that the copy of this survey called a "transcript plat" returned in 1841, to the recorder along with patent certificate No. 447 issued in 1841, where set aside by its instructions from the Land Office in 1847, and a new set of documents ordered in lieu of the same.

CONCLUSION.

It is submitted that the judgment of the Supreme Court of Missouri should be reversed with directions to enter judgment for the plaintiff as was done on the first hearing.

JOHN D. McPHERSON,
For Plaintiff in Error.

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Conclusion.

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NOTES FOR REPLY TO GLOVER AND SHEPLY.

It is claimed for the defendant that the possession of Chouteau operates as a grant of the equitable title, by the laws of Missouri. In the first place the State has no power to pass such an act, and none such has been passed.

SECOND. Its Courts have made no such decision. The point was made in the first hearing below, and held against the defendants; in the second opinion it is held that the remedy is extinguished, but the right is not conveyed. (39, Mo. p. 587.)

THIRD. If the possession prior to the issuing of the patent would operate as a grant, or presumption of a grant of the equitable title and the legal title by patent be made enure to it, this would be in effect to bar and pass away the title indirectly when it could not be done directly. If the plaintiff was not bound to sue on the equitable title under the statute of the State giving an ejectment on it, no *presumptions* can be made against him. He is guilty of no laches or default. If the equitable title can be transferred by presumption of a grant by mere time it is clear that the maxim that, the statute of limitation does not commence to run until the patent issues is a barren fiction, for it could be of no avail in any case where it is needed.

The defendant's counsel puts the question, (assuming that Clay had obtained the title to the certificate,) "What then was acquired by MacRee by Clay's deed?" "Simply, the New Madrid certificate, No. 150—*the right to locate.*" (Glover & Sheply, p. 9.)

In Rector vs. Ashly, (6 Wall,) it was admitted that Rector had done all that he was required to do in order to appropriate the land to his location certificate prior to any act on the part of the State of Arkansas, and that this location was approved by the Recorder after the entry by the State of Arkansas, and it was insisted that he had thus acquired a right which could not be defeated, and that the subsequent

approval of the Recorder would relate to his incipient claim and cut out the intervening title. This Court held that he acquired no right to the land by his *own* act, that his right or interest could only take its birth from the act of the Government, through its agent, who was the Recorder. If he had had, prior to such approval, any interest or claim whatever to which relation could be made, anything to "tie to," it is clear that the judgment of this Court would have been the very reverse of what it was. Therefore, *no one* had any interest in this land prior to the 16th of August, 1841, and the only question can be whether MacRee's deed could pass the interest subsequently acquired. (Hale vs. Garres, 19 Ark; Rector vs. Ashe, 20 Ark.)

The decree in Hertzog vs. Wilt, (p. 45;) the deed of Hertzog to Wash, (p. 48;) the deed of Wash to Chouteau, (p. 57;) the sheriff's sale to Clay, (pp. 53–4–5;) the judgment in Clay vs. Herzog, (p. 56;) the deed of MacRee to Chouteau, (p. 70;) the deed of Clay to MacRee (p. 58,) were one and all prior to the approval of the location by the Recorder of land titles, in 1841;—*each and all* of these documents are quit-claims and not do pass an after acquired interest; and, therefore, the decision below, that no one acquired Wilt's title until the decree of 1848 was made, was correct.

As neither Clay nor MacRee had then any interest whatever in the land, and owned "simply the New Madrid certificate, No. 150—the right to locate;" and, as MacRee's deed to Chouteau was a naked quitclaim conveying his interest in the *land only*, and not in the certificate, nothing could pass by it.

The decision of the Supreme Court below was full and emphatic on this point. (39 Mo., 569, 586; Rector vs. Ashly, 20 Arkansas, and 6 Wall.)

This point is decisive of defendant's claim to the equitable title.

Again. In Bagnell vs. Broderick, this court declares that it is bound to presume that the patentee had the "superior right to obtain it," and this, of course, rebuts any "presumption" that the equitable title was owned by any other person than the grantee, for if that were so, the patentee could not have the "superior right to obtain it."

AS TO MACREE'S DEED TO CHOUTEAU.

Where there is no proof as to the time of the delivery of a deed it is "elementary law" that it takes effect from the day of its date, and not the time of its acknowledgement, if that be on a different day. Shep. Touchstone, 72. It is laid down as "elementary law" that "all deeds do take effect from, and therefore have relation to the time, not of their date, but of their delivery, and *this is always presumed to be the time of their date unless the contrary do appear.*"

See to same effect Beston Presumptions, sec. 389.

Breckinridge vs. Todd, 3 Monroe, 52.

Owen vs. Owen, 5 Humph., 354.

Roots vs. Holliday, 6 Mun., 258.

Morgan vs. Whitemore, 6 Exc., 716.

Wood vs. Owings, 1 Cranch, 251.

Again. The defendants contend that deeds are to be presumed to be delivered at the time when recorded. I admit this proposition because it is fatal to the defendants' title for the deed from MacRee to Chouteau was recorded November 8, 1839, and the deed from Clay to MacRee was not recorded until June 2, 1840, seven months afterwards.

It is therefore certain that if either the date or the recording of the deed is to prevail, MacRee's title incepted *after* his deed to Chouteau, even admitting that Mr. Clay had obtained the equitable title. No reason is or can be given why a deed should take effect from its acknowledgment.

In Wood vs. Owings, 1 Cranch, 251 this court held that a deed does not take effect from its acknowledgment.

Clay's deed to MacRee did not relate to the deed of Ann MacRee and al., in 1836, because if William MacRee had paid the money for this land, which does not appear, no memorandum in writing was made or signed by either party, the sale was a pure nullity, and he had at best a mere right to recover back the purchase money, but no claim or anything that could ever—even in equity—be ripened into a claim to the land. This was, therefore, no step in the transfer of the title. It bears no analogy to Landes vs. Brant, for there the patent was related to the first step in the title. It does not appear that the money was paid for this land. It might have been paid on any other account.

The successor of Samuel MacRee is not estopped from denying the averments in the bill filed by him in 1844. (Deery vs. Cray, 5 Wall., 795.)

It is not sufficient for the defendants to show that MacRee was merely estopped to deny the statements in this bill. They must go further and prove that the estoppel is such as to transfer the title to themselves, and this bill certainly does not operate as a transfer of title to Chouteau. The plaintiff claims under the patent. The bill is no part of his chain of title.

But assuming that all the facts stated in the bill are true, still Samuel MacRee had no title prior to 1848, when the decree was made, for if the property descended in equity to Hertzog as surviving partner, then the sheriff's sale to Mr. Clay was void for the execution, notice of sale, and the sheriff's deed all purport to sell, not the interest of Hertzog *as surviving partner*, but *his individual interest only*. (Record, pp. 53-4-5.

The firm is stated to be insolvent, and if the property belonged to it, then it would, on the defendant's thereory, go to the creditors of the firm, and neither Wilt nor Hertzog

had any interest in it *individually*. This sale was *in invitum*, and transfers no greater or other interest than the documents purport to convey, and cannot be aided in equity. (Moreau vs. Duchmendy, 18 Mo., § 522.

Taking all the facts stated in the bill and exhibits as true, still Samuel MacRee had no equitable claim. The decree, therefore, was the inception of his title and gives him a *new* title, for without the *decree* he had no title nor anything upon which to base his complaint in equity.

AS TO CHOUTEAU'S TITLE UNDER WASH.

Hempstead's deed, as guardian, was made to Hertzog *as surviving partner*. (Record, p. 39.)

Hertzog's deed of trust to Wash conveys his *individual title only*, and to secure his *individual* debt, (Record, p. 48,) and, therefore, it passed nothing.

The deed to Wash was made "in consideration of the mutual trust and confidence reposed in the said R. Wash, who is charged and entrusted with the collection of said debt in the way of his profession as the attorney at law of the said Devotion"—the beneficiary. (Record, p. 43.) He could not, therefore, transfer his trust estate.

His deed to Chouteau shows on its face that he supposed he had authority to convey the title by his deed alone. It does not recite that any notice had been given, or that a sale was made at public auction, or in conformity with the power. Lapse of time can raise no *presumption* against a patent. Wash could not convey the legal title, for it was not in him, and such a conveyance in equity is void. There is no room for any presumption, for we have the deed itself. If the deed did convey the estate held by Wash to Chouteau, then Chouteau entered as trustee, and still continues to hold as such.

AS TO THE DECREE IN THE CASE OF CLAY VS. HERTZOG'S AND WILT'S HEIRS, IN 1833.

This document is fragmentary and unsupported by any evidence.

It does not state who were the heirs of Wilt, nor how many there were. It does not recite the bill, nor is the bill produced. (1 Phil. Ev., 138.) It declares that the bill shall be taken *pro confesso* against the non-resident defendants without stating which of the defendants were non-resident, and purports to divest the title out of some named parties without stating that they or any of them were non-residents or had ever been notified of the suit.

Supreme Court of the United States.

No. 247.—December Term, 1867.

CHARLES GIBSON, *Plaintiff in Error*,

vs.

CHARLES P. CHOUTEAU and JULIA MAFFIT, Devisees of PIERRE CHOUTEAU, Jr., deceased, *Defendants in Error.*

Brief for Defendants in Error on motion to dismiss the writ of error, sued out from this Court to the Supreme Court of Missouri, for want of jurisdiction.

BRITTON A. HILL,
of Counsel for the Defendants in Error.

STATEMENT OF CASE.

The plaintiff in error sued the defendants in error, in a State Court of Missouri, in ejectment, for sixty-four acres of land, adjoining the city of St. Louis. Petition was filed the 23d day of September, 1862. The plaintiff in error claimed title under a patent of the United States, issued to the representatives of James Y. O'Carroll, under a New Madrid location made pursuant to the "Act of Congress for the relief of the inhabitants of New Madrid, in the Missouri Territory, who suffered by earthquakes," approved February 17th, 1815.—(Vol. 1, Public Lands—Laws and Instructions, p. 225.) Said patent was

dated the 10th day of June, 1862, and related to the preceding location, so as to pass title by relation, as of the 16th day of August, 1841.—(Rec., p. 102.)

The defendants in error insisted in defence, that their testator held by derivative title, under James Y. O'Carroll, and that said testator had had and held open, notorious, and continuous possession of the premises sued for, adverse to all other persons, for about forty years prior to the commencement of this suit.

The State Court held that this was a good defence under the statute of limitations in Missouri, and entered a judgment for the defendants.—(Rec., p. 108.)

To this judgment the plaintiff sued out a writ of error to the State Court, and the defendants have now filed their motion to dismiss the case for want of jurisdiction, under the 25th section of the Judiciary Act.

The opinion was given at the March term of the Supreme Court of Missouri, 1867.—(See Gibson vs. Chouteau's heirs, Missouri Reps., vol. 39, p. 586.)

BRIEF ON MOTION.

PROPOSITION 1.

The State Court, in this case, has not decided against the validity of any act of Congress, or treaty or authority exercised under the United States; nor does the decision of the State Court affect any other question within the purview of the 25th section of the Judiciary Act of 1789. (Vol. 1, U. S. Stat. at Large, p. 85-6.)

The State Court simply determined that the patent was valid; that the acts of Congress and of the government officers were effectual to pass the title under the patent and the preceding acts of location, by relation from the patent to the original acts, to the representatives of James Y. O'Carroll, and held that the statute of limitation of Missouri barred the plaintiff from recovering in this action.—(*Gibson vs. Chouteau*, 39 Missouri Rep.,

586 to 591.) At p. 591, the State Court declares: "The 'plaintiff stands in her place (Mrs. McRee's place) here, and 'must fail to recover, not because the patent is declared 'invalid, or ineffectual to pass the title from the United 'States, nor because the title has not been conveyed to 'him, but because the statute of limitations has extin- 'guished his remedy by taking away every kind of ac- 'tion."

At p. 592, 39th Mo. Rep., the court further declares: "Upon these principles the statute (of limitation) is made 'to operate a bar to the plaintiff's action, without coming 'in conflict, in any manner, with the decisions of the 'Supreme Court of the United States as to the effect and 'dignity of a patent, or with the constitutional compact, ''that the State shall never interfere with the primary 'disposal of the soil of the United States, nor with any 'regulation Congress may find necessary for securing the 'title in such soil to the *bona fide* purchasers.' It contem- 'plates that the title has passed out of the United States, 'by virtue of the patent, and in accordance with the laws 'of the United States, and become vested in such pur- 'chaser."

The State Court further held, p. 587, that "adverse 'possession for the full period of the statute of limita- 'tions may be evidence of a fee, and equivalent to an 'absolute title against all but the sovereign."—(3 Greenlf., Crui. Dig., tit. 31, ch. 2, sec. 1–4; Ang. on Lim., 396; Biddle vs. Mellon, 13 Mo., 335; 1 Greenlf. Ev., sec. 16; *Landes vs. Perkins*, 12 Mo., 258; *Hunter vs. Hemphill*, 6 Mo., 119; *Clemens vs. Runckle*, 34 Mo., 41.)

As to the relation back to the inceptive right, so as to pass the legal title as of the day when the first steps were taken, see case 39th Mo. Rep., 587 to 592.

PROPOSITION 2.

It is clear that this decision is most strictly confined to the local laws of Missouri, concerning the operation and

effect of the statute of limitations of that State, upon titles arising under inceptive titles or claims, perfected into patents under proceedings in the land offices of the United States, authorized by acts of Congress.

The State Court holds that both parties are compelled to invoke the doctrine of relation; the plaintiff, in order to obtain the benefit of the deeds and proceedings prior to the patent, and the defendants in order to avail themselves of their defence under the statute of limitations.

For a long time in Missouri, the local law has recognized this defence of the statute of limitations, in cases of inceptive claims, and equitable titles to lands.—(See cases cited in opinion in this case, 39 Mo., 585 to 593; *Clemens vs. Runckle*, 34 Mo., 41; *Biddle vs. Mellon*, 13 Mo., 335; *Gray vs. Givens*, 26 Mo., 291; Hunter vs. Hemphill, 6 Mo., 119, A. D. 1841).

In all cases of New Madrid locations, the statute of limitations in Missouri has been held to run from the time the certificate of location was returned to the recorder of land titles.—(*Cabanne vs. Lindell*, 12 Mo., 184.)

The certificate of location in this case was returned in August, 1841, more than twenty years before suit brought; was issued the 30th November, 1815, and was surveyed the 16th June, 1818.—(Rec., p. 22 and 23.)

By the statutes of Missouri, an action of ejectment will lie on a New Madrid location.—(See Rev. Codes of 1825, 1835, 1845, 1855, and 1866—title, ejectment.)

The Supreme Court of the United States has held, in the cases of *Landes vs. Brant*, 10 How., 372, and *French vs. Spencer*, 21 How., 228, that the inceptive titles created by various acts of Congress, were property, and the doctrine of relation has been held to vest the legal title at the date of the commencement of the proceedings to obtain the title.—(See opinion in *Gibson vs. Chouteau*, 39 Mo., 585 to 592, and the cases cited.)

PROPOSITION 3.

By a long course of decisions in the Supreme Court of the United States, it has been held, that jurisdiction will not be taken of such a case as this under a writ of error from a State Court.

In *Railroad Co. vs. Rock*, 4 Wallace, 177, it it was held, "that the record must show that some one of the matters mentioned in the 25th section of the Judiciary Act was necessarily decided by the State Court. If it appears from the record that the State Court might have decided the case on some other ground, this court has no jurisdiction."

In the case at bar, it appears that the State Court expressly decided in favor of the validity of the New Madrid Act, and in favor of the authority of the officers of the United States, acting under that statute. The title has been held to have passed from the United States by force of the New Madrid Act, and in strict accordance therewith, and the controversy has been decided upon other grounds, local to the State of Missouri.

In *Ryan vs Thomas*, 4 Wallace, 603, this court held that, "where a decision of the highest court of law or 'equity in a State, is *in favor* of the validity of a statute 'or of an authority exercised under the United States, 'drawn in question in such court, this court has no revi-'sory power."

So also it was held in *Lawton vs. Walker*, 14 How., 149; *Mills vs. Brown*, 16 Peters, 525; *McDonough vs. Millandon*, 3 How., 707, and Doe vs. Eslava, 9 How., 448.

There is, therefore, no theory upon which this court can take jurisdiction of this writ of error from the State Court of Missouri, and it should be dismissed.

BRITTON A. HILL,
Of Counsel for Def'ts in Error.

WASHINGTON, *December* 30, 1867.

Supreme Court of the United States.

No. 103.—December Term, 1868.

CHARLES GIBSON, *Plaintiff in Error*,

vs.

CHARLES P. CHOUTEAU and JULIA MAFFIT, *Devisees of Pierre Chouteau, Jr., deceased, Defendants in Error.*

Statement and brief for defendants in error, on the merits, to be annexed to the brief on the motion to dismiss for want of jurisdiction, by

BRITTON A. HILL,
Of Counsel for Defendants in Error.

Statement.

Both parties claim title under a New Madrid location, perfected the 16th August, 1841, by the return of the survey to the recorder of land titles, and the issue of a patent certificate to O'Carroll and his legal representatives, by the said recorder, at St. Louis, for the land in suit, parcel of a larger tract included within the same location, situate in St. Louis township.

On the 10th day of June, 1862, a patent was issued on said location to Mary MacRee, as assignee in right of the said James Y. O'Carroll, in virtue of deraignment of title, for all the land embraced in said location.—(Record, pp. 16, 20.)

On the 8th day of August, 1862, said Mary MacRee conveyed about sixty-four acres of said O'Carroll location to Charles Gibson, the plaintiff, which is the land in suit, claimed by the defendants in error.

The chain of title is as follews:

1st. Confirmations for land in New Madrid, to James Y. O'Carroll, for one thousand arpens, 13th March, 1806, reduced on 14th December, 1810, to three hundred and fifty arpens, and extended by the recorder of land titles to six hundred and forty acres in 1815, and finally confirmed by act of Congress 29th April, 1816, to O'Carroll and his legal representatives.—(Record, p. 99 to 103.)

2d. Deed acknowledged and recorded, from James Y. O'Carroll to George Ruddell, of 1805, for all the land in his settlement right, that may be confirmed by the commissioners or by Congress.—(Record, pp. 31–2.)

3d. New Madrid certificate, No. 150, November 30, 1815, by Bates, recorder of land titles, to James Y. O'Carroll, or his legal representatives, for six hundred and forty acres of land injured by earthquakes, authorizing the location of a like quantity of land in lieu of the land so injured, on any of the public lands in the Territory of Missouri, the sale of which is authorized by law. —(Record, p. 22.)

4th. Location of said certificate, by Christian Wilt, for James Y. O'Carroll or his legal representatives, November 18, 1816, on the land covered by the patent of 1862, to Mary MacRee, as assignee of O'Carroll.—(Record, p. 23.)

5th. Certificate of location by J. C. Brown, agent of Christian Wilt, on fractional sections 20 and 17, west half of fractional section 21, and north side of fractional section 28, T. 45; June 16, 1818.—(Record, p. 24.)

6th. United States survey of said New Madrid location of O'Carroll, No. 150, made by Joseph C. Brown, deputy United States surveyor, in April, 1818.—(See Record, p. 24, and plat, p. 31.)

This survey was not returned to the Recorder of Land Titles until the 16th August, 1841.

7th. Deed of George Ruddell to James Tanner and Andrew P. Gillespie, 7th March, 1816, for five hundred and fifty arpens of the O'Carroll head and settlement right in New Madrid injured by earthquakes.—(Record, p. 25.)

8th. Deed of George Ruddell and wife to A. P. Gillespie, 16th of May, 1818, for two hundred arpens, part of said settlement right.—(Record, p. 28.)

9th. Deed of George Ruddell to George Dameron, 1st November, 1815, for two hundred arpens, part of said settlement right.—(Record, p. 26.)

10th. A general assignment, by A. P. Gillespie to James Tanner, for all his interest and title in the O'Carroll claim, acknowledged 18th May, 1816.—(Record, p. 29.)

11th. Deed of A. P. Gillespie to James Tanner, 1st June, 1818, for the two hundred arpens, part of the O'Carroll settlement right.—(Record, p. 30.)

12th. Deed of Rachel Dameron, William Nelson, and John Dameron, heirs of George Dameron, to James Tanner, 18th October, 1816, for said two hundred arpens, conveyed by George Ruddell to George Dameron as above, 9th.—(Record, p. 36.)

The O'Carroll head right, and all the confirmations in his favor, vested by the foregoing deeds in James Tanner, who became the owner of the New Madrid lands of O'Carroll injured by earthquakes.

13th. Deed of James Tanner to Christian Wilt, dated 1816, granting the right to Wilt to locate the six hundred and forty acres confirmed to O'Carroll or his legal representatives.—(Record, p. 37.)

14th. Deed of Hempstead, guardian of George W. Wilt, only son and heir of Christian Wilt, deceased, to Joseph Hertzog, surviving partner of Hertzog & Wilt, dated 10th September, 1821, for the six hundred and forty acres in the New Madrid location for Christian Wilt, No. 150, &c. —(Record, p. 39.)

This deed was made pursuant to a decree of a court of equity, entered August, 1821, at St. Louis.

15th. Record of said decree, in Hertzog vs. Wilt by guardian, August term, 1821, authorizing Hempstead, guardian of George W. Wilt, to convey this land, N. M. Certificate, No. 150, to Joseph Hertzog. The guardian was appointed without any service of process on the infant, which rendered the decree voidable.—(Record, p. 42.)

16th. Joseph Hertzog to Robert Wash, trustee for Louis Devotion, deed of trust of 26th October, 1822, for the whole of the New Madrid location of six hundred and forty acres, and other lands, to secure a debt of $9,549, giving Wash, the trustee, power to sell, on ten days' notice, a part or the whole of said lands.—(Record, p. 48.)

17th. Louis Devotion, by trustee R. Wash, to Pierre Chouteau, jr., for $128, the sixty-four acres now sued for, dated November 27, 1824.—(Record, p. 51.)

In 1826, Pierre Chouteau entered under this deed, built houses, enclosed the land, and has cultivated and possessed it until his death in 1865, (Record, pp. 74, 75,) a period of forty-one years.

18th. Judgment in favor of Henry Clay, executor of James Morrison, against Joseph Hertzog, surviving partner of Christian Wilt, for $2,286 debt, and $147 $\frac{45}{100}$ damages; and sheriff sale under execution on said judgment, of the six hundred and forty acres of O'Carroll's New Madrid location, to Henry Clay, executor of James Morrison.—(Record, p. 53 to 56.)

19th. Decree in equity in suit of Henry Clay vs. Wilt, and Joseph Hertzog's heirs, vesting all the right, title, interest, and estate in law or equity of the defendants in Henry Clay, executor of James Morrison, in fee simple forever, on the 10th of May, 1833.—(Record, p. 56.)

20th. Henry Clay, executor of Morrison, to Wm. Mac Ree, a title bond, dated before the 4th of July, 1836,

agreeing to convey said six hundred and forty acres in New Madrid location, No. 150, to Wm. MacRee, for $500, cash paid to said Clay in hand. This bond is lost.—(See Record, pp. 58, 59.)

21st. Deed of Henry Clay and wife to Ann F. MacRee, James F. MacRee, and Samuel MacRee, heirs of William MacRee, October 11, 1839, for $500, theretofore paid by William MacRee, deceased, all the six hundred and forty acres aforesaid.—(Record, p. 58.)

22d. Deed of Ann F. MacRee, James F. MacRee, and Mary A. MacRee, to Samuel MacRee, dated 4th July, 1836, stating that William MacRee had died intestate, that grantors were his heirs-at-law, and they conveyed the said six hundred and forty acres to Samuel MacRee. —(Record, p. 59.)

23d. Samuel McRee filed a bill in chancery in St. Louis Circuit Court 23d March, 1844, against the heirs of Jos. Hertzog and Christian Wilt, to remove all clouds on the title on account of any irregularity in the equity suits or decrees of 1821, and all the estate, title, right and interest of each and all the defendants was vested in Samuel McRee and his heirs, in fee simple, June 30th, 1848.—(Record, p. 61 to 69.) If the decree of 1833 (Record, p. 56) was regular this decree of 1848 was unnecessary.

24th. Samuel McRee and wife to Pierre Chouteau, jr., deed of 30th August, 1838, for $150, did "bargain, sell, release, quit-claim, and convey unto Pierre Chouteau, jr., the sixy-four acres of land now in suit, as part of the O'Carroll N. M. location to him and his heirs.—(Record, p. 70.)

If the equity suit of Henry Clay, executor of James Morrison, against the heirs of Joseph Hertzog and Christian Wilt, vested the title in Henry Clay, executor as aforesaid, in 1833, the bill of McRee was fruitless.

The plaintiff asserts that the deed of McRee and wife to Pierre Chouteau, jr., of 30th August, 1838, was merely

a quit-claim; that the equitable title of McRee did not pass by the deed, and that the decree of June 30th, 1848, vesting the entire equity and inceptive title, would not authorize the court below to hold that the after acquired title of McRee, by force of the decree of 1848, would enure to the benefit of Pierre Chouteau, jr., under the deed of 1838, from S. McRee and wife, for the land in suit.

In August, 1849, Samuel McRee died, leaving a testament devising all his estate, real and personal, to his widow, Mary McRee, and her heirs.—(Record, p. 80.)

The plaintiff, supposing that he could seize upon the houses and land of Pierre Chouteau, jr., embraced within the O'Carroll New Madrid location, by reason of the irregularities in the passage of the title, and being solicitor of the Court of Claims in 1862, procured a patent to issue to Mary McRee, as assignee of O'Carroll, for the whole of the O'Carroll location, in June, 1862, and obtained a deed for the sixty-four acres in suit from the widow McRee soon afterwards, and sued defendant in ejectment on the 23d September, 1862, for the land he had occupied so many years, under deed from all the parties in interest.

The defendant set up in defence a confirmation to Calve, of 1816, for a portion of the land (Record, p. 71); an United States survey for Calve, approved 31st January, 1845 (Record, pp. 73, 74, plat, p. 20); and an adverse possession, open, notorious and continuous from 1826 down to the day of trial.

The state court at *nisi prius* gave a judgment for the plaintiff, which was reversed in the supreme court of the state on the questions of the statute of limitations, and the relation of the patent to the day when the survey was returned to the recorder of land titles, and the first patent certificate was issued; and gave the defendant a judgment for costs.

To this judgment the plaintiff sued out a writ of error to this court.

The defendant having died, his heirs and devisees were made parties, and at the last term of this court, they filed their motion to dismiss this case for want of jurisdiction, which remains now to be determined with the case on the merits.

BRIEF.

1st. The statute of limitations began to run in this case, against the party through whom the plaintiff claims title, on the 16th day of August, 1841, when the United States survey of 1818 of the O'Carroll New Madrid location was returned by the surveyor general to the recorder of land titles, and to which the patent relates back and vests title.

Cabanne vs. Lindell, 12 Mo., 184, (A. D. 1848.)
Gray vs. Givens, 26 Mo., 291, (A. D. 1858.)
Biddle vs. Mellon, 13 Mo., 335.
Clemens vs. Runckle, 34 Mo. 41, (A. D. 1862.)
Gibson vs. Chouteau's devisees, 39 Mo., 588, (1867.)

2d. The exchange between James Y. O'Carroll and the United States was effected and perfected on the 16th August, 1841, whereby the lands in New Madrid, confirmed to O'Carroll, were transferred to the United States, and the lands sued for, embraced in the United States survey of the O'Carroll location, in St. Louis township, were transferred to O'Carroll or his legal representatives, and this was an *exchange* by operation of law.—(*Bagnall vs. Broderick*, 13 Pet., 450. *Lesseur vs. Price*, 12 How., U. S., 74. *Barry vs. Gamble*, 3 How., 51. *Rector vs. Ashley*, 6 Wallace, 149, 1867.)

3d. The patent issued the 10th of June, 1862, on the United States survey for the New Madrid location in St. Louis township, was a mere form, consummating and perfecting the exchange by the execution of the formal deed of the United States to O'Carroll and his legal representatives, and this patent related back to the original act of exchange, like a judgment, execution, and sheriff's deed on an attachment of lands; and passed the title ac-

cording to the act of Congress, as of the day when the exchange was effected, on the 16th of August, 1841, and legal title under the patent vested on that day, by relation, in James Y. O'Carroll and his legal representatives, through whom plaintiff claims title.

4 How 361-2

Landes vs. Brant, 10 How., U. S., 372, (1847.)
Lessee of French and wife vs. Spencer et al., 21 How., U. S., 239, (1858.)
Stark vs. Storrs, 6 Wall., U. S., 418.
Ross vs. Barland, 1 Peters, 655, (1828.)
Jackson vs. Bull, 1 John. Cas., 86, (1799.)
Boyd vs. Longworth, 11 Ohio, 235.
Alexander vs. Merry, 9 Mo., 524.
Crowley vs. Wallace, 12 Mo., 145.
Jackson vs. McCall, 3 Conn., 75.
Rutherford vs. Green, 2 Wheat., 297.
Barr vs. Gratz, 4 Wheat, 213.
Cavender vs. Smith, 5 Clarke, 157.
Rogers vs. Brent, 5 Gilm., 573.
Smith vs. Allen, 1 Black., 22.
Witherspoon vs. Duncan, 4 Wall., 218.
Stark vs. Storrs, 6 Wall., 417.

(*a*) The return of the survey on the 16th August, 1841, required the recorder of land titles to issue a patent certificate on that day, in the same form and with the same effect as if a confirmation had been made of a Spanish claim by the board of commissioners, under the acts of March 2, 1805, and March 3, 1807.—(Land Laws, vol. 1, p. 122 and p. 153.) The same words are employed, that "the party is entitled to a patent for the tract of land therein designated."—(Sec. 6, act of 1807, id., vol. 1, p. 154, and sec. 3 of New Madrid act of 17th of February, 1815, id., vol 1, p. 256.)

In the case of *Landes vs. Brant*, 10 How., 372, the claim for confirmation of the inceptive Spanish equity was filed the 1st of March, 1806, the confirmation was made in 1810, and the patent was issued in 1845, to Cla-

morgan and his legal representatives, the original claimant, under whom Landes claimed by deeds from Clamorgan's devisees. The defendant claimed under a sheriff's sale, on execution against Clamorgan, of the inceptive Spanish equity, in 1808, when the legal title to the land was in the United States, and it was not subject to sale or execution; but this court held that the patent, by relation to the filing of the claim for the confirmation of the inceptive Spanish equity, vested the legal title in Clamorgan, as of the date of the original claim in 1806, and that the sheriff's sale in 1808 passed that legal title to the purchaser, under whom defendant claimed title.

In the case of *French et ux. vs. Spencer et al.*, 21 How., U. S., p. 239, (1858,) the location of a military land warrant was made the 3d June, 1816, on which a patent was issued the 26th October, 1816, to Silas Fosgit, under whom the plaintiff claimed as his heir-at-law, but Fosgit had made a deed for said location to Wm. Spencer, on the 28th June, 1816, while the legal title was in the United States, and this court held that the patent related back to the date of the location on the 3d of June, 1816, and vested the legal title in Fosgit as of that date, so as to make the deed of the 28th June, 1816, operative to convey the legal title by force of the fiction of relation. This court approved the doctrine of relation, as stated in Landes vs. Brant, 10 How., and also the case of *Ross vs. Barland*, 1 Peters, 655, wherein it was held that an entry on which a patent issues at any time afterwards "shall relate to the entry and take date with it."

The cases of *Bagnall vs. Broderick*, 13 Peters, 436, and of *Wilcox vs. Jackson*, id., 516, were cited and relied on by the plaintiff in *French vs. Spencer*, 21 How., *supra*, as the plaintiff relies on them in this case, to show that the legal title to the land was in the United States until the issue of the patent; but this court held the title passed by relation of the patent, as of the date when the entry, confirmation, claim, or location was made.

In *Jackson vs. Bull*, 1 John. Cas., 86, (1799,) it was held that a deed made in pursuance of a contract relates back to the contract, so as to make valid every intermediate contract or conveyance by the grantee, and by *relation* to vest the title in the grantee as of the *date* of the previous contract. The other cases cited in support of the third point in this brief support the same principle. See, also, the learned review of the cases by Mr. Justice Holmes, now royal professor of law in Cambridge University, who delivered the opinion of the court in this case in the Supreme Court of Missouri.—(39 Mo. Rep., 588 to 595, 1867.)

In *Stark vs. Storrs*, 6 Wallace, 402–418, the same doctrine of relation is stated in a learned opinion by Mr. Justice Field. The plaintiff, Storrs, claimed by deed from the city of Portland, the land located under an entry of the 1st of February, 1858, by the city of Portland, of three hundred and seven acres as a town-site under act of May 23, 1844, on which a patent was issued to the city on the 7th December, 1860. The defendant, Stark, claimed the same land under a certificate of the surveyor general, that he was entitled to a donation right therein on the 10th of September, 1853, and a patent was issued to him on the 8th day of December, 1860. This court held that the right of Stark to the patent for the land was vested in him on the date of the certificate of the 10th September, 1853, and that "the right to a patent once vested, is treated by the government, when dealing with the public lands, as equivalent to a patent issued." "When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off the intervening claimants."

4th. The foregoing authorities establish, that if the patent be valid, it vested the legal title in James Y. O'Carroll, and his legal representatives, on the 16th August, 1841, by relation; and if the patent be void, then the plaintiff has no title, and no right to recover.

Both parties regard the patent as valid, and although it issued to Mary MacRee as assignee, or legal representative of J. Y. O'Carroll, it relates to the date of the exchange of lands in August, 1841, and vests the legal title in James Y. O'Carroll and his legal representatives as of that date. Samuel MacRee, through whom both plaintiff and defendants claim to derive title, was then the owner of the equitable, or inchoate, title, and the defendants' testator having held exclusive and continuous adverse possession of the land in suit for thirty-six years prior to this suit, and that equitable, or inchoate, title having become a legal title in 1841, by force of the relation of the patent, the statute of limitations has extinguished plaintiff's remedy under the local law of Missouri by taking away every kind of action.

5th. The statutes of Missouri declare that, in all actions of ejectment in said state, "the title to the land located by virtue of such New Madrid certificate, or patent, shall be determined according to the rights of the parties to the land as *located* by virtue thereof."—(Sec. 11.)

"The real owner of the title shall prevail, and the patent, to whomsoever issued, shall only be *prima facie* evidence of the title of the patentee."—(Sec. 12, Rev. Code, 1855, title, Ejectment, p. 692; Rev. Code of 1845, and Laws of 1839, in *pari materia*.)

These laws were enacted by the General Assembly of Missouri to meet the hardship of the technical rule laid down in *Bagnell vs. Broderick*, 13 Peters, 445, (1839,) and to prevent circuity of action, or an appeal to a court of equity. The location and patent in that case were to John Robertson, jr., for the newly located lands, and the title to the New Madrid lands injured by earthquakes was in Morgan Byrne, and the statutes of Missouri merely providing for an action of ejectment on a New Madrid location, it was held by this court that Byrne must resort to a court of equity, in order to get the benefit of the

patent.—(13 Pet., 450.) But by these late enactments of the General Assembly of Missouri, the patent is only *prima facie* evidence of the title of the patentee, and the patent shall enure to the benefit of the real party in interest, the real owner of the land injured by earthquakes, and the real owner of the land located in lieu thereof, "according to the rights of the parties."

These enactments have changed the practice in Missouri in ejectment suits by permitting every kind of equitable title to be inquired into in actions on locations or patents under the New Madrid act, and the party showing the better right to the location, or patent, may recover or defend in ejectment, and is not driven into equity to assert his right or title. In 1849, a code was adopted in the State of Missouri abolishing all distinctions between law and equity, and that code, as revised and amended, has ever since continued in force. This suit was tried under that code, and the defendant was found to have the title to the sixty-four acres sued for as part of the location by force of the relation of the patent to the date of the patent certificate, which was issued 16th August, 1841, after the return of the United States survey to the recorder of land titles, and an adverse possession of more than twenty years from that day.

The plaintiff insists that when Samuel MacRee, his grantor, made a deed in 1838 to "bargain, sell, release, quit-claim, and convey unto Pierre Chouteau, jr., and his heirs," the sixty-four acres sued for as part of the O'Carroll location, MacRee did not hold the title by reason of want of service of process in a suit in equity of 1821, avoiding the decree through which he claimed title. It will not be denied, that if MacRee had held a deed, or a decree, for the inceptive equity to the New Madrid claim in 1838, when he made the deed to Chouteau, the patent of 1862 would have related back so as to have passed the legal title to Pierre Chouteau in August, 1841, for the sixty-four acres conveyed to him, and there would

have been no occasion to invoke the relation of the patent to James Y. O'Carroll, and the bar of the statute of limitations as against his title.

Defendants claim that the open, notorious, continuous, and adverse possession of the sixty-four acres sued for, by color of title under the deed of 1838, from James MacRee and wife to Pierre Chouteau, for twenty-four years prior to suit brought, gives a positive title to defendants as against MacRee, and all persons but the sovereign, and not only bars the action of the plaintiff, but takes away his right of possession.—(*Atkyns vs. Horde*, Burr, 119; Bacon's Abr., vol. 3, p. 619, 620, ed. of 1856; Id., vol. 6, p. 369; 3 Cruise's Dig. by Greenlf., tit. XXXI., chap. 11, sec. 21, p. 436; Pederick vs. Searle, 5 S. & R., 240; Jackson ex. dem. Wright vs. Dieffendorf, 3 John., 269; *Biddle vs. Mellon*, 13 Mo., 340, and cases cited in brief of counsel; Rev. Code of Mo., 1835 and 1845, tit., Limitations; *Leffingwell vs. Warren*, 2 Black., U. S., 602.)

Whatever right, claim, or equity Sam. McRee had in 1838, or in 1848, passed to Chouteau by force of his possession. Equitable claims and rights pass in Missouri as well as legal titles by force of the adverse possession for the period fixed by the statute of limitations. In 1847 the period of limitations in suits for real estate was fixed at ten years, and the same rule has existed from that time. The equitable title of McRee was barred by limitation after he acquired all the equitable interests by the decree in 1848, and all the interest of McRee in law or equity was thereby vested in Chouteau for the land so possessed adversely for the period fixed by the statute.—(*McNair vs. Lot*, 34 Mo., 303; *Clemens vs. Runckle*, 34 Mo., 43, and cases cited; *Biddle vs. Mellon*, 13 Mo., 340; *Jackson vs Oltz*, 8 Wend., 440; *Jackson vs. Harden*, 4 I. R., 210; *Cholmondeley vs. Clinton*, 2 Jac. & Walk., 191.)

6th. The plaintiff further objects that the deed of 1839, from Henry Clay and wife to Ann, James F., and Samuel McRee, heirs of Wm. McRee, deceased, was subsequent

to the deed of Samuel McRee to Pierre Chouteau, jr., in 1838, which did not pass the after acquired title. But it appears from recitals in the deed of 1839 that Wm. McRee had paid Henry Clay $500 in his lifetime for the O'Carroll location, and it further appears from the recitals in a deed of 4th July, 1836, from Ann F., James F., and Mary A. McRee, to Sam. McRee, that William McRee had died before then intestate, and that Sam. McRee was one of the heirs of Wm. McRee.—(Record, p. 59.)

The deed of Henry Clay and wife, of the 11th of October, 1839, to the McRees, relates back to the contract of sale of 1836, when the money was paid for the purchase of the land, and passed the title or inceptive right and claim as of that date, so as to vest all the equity, inceptive right and title of Henry Clay, executor, &c., to the O'Carroll location in the McRees, as of the date of the contract in the spring of 1836.—(*Jackson vs. Bull*, 1 John's Cas., 89.)

The deed of Samuel McRee and Mary, his wife, to Pierre Chouteau, jr., though dated the 30th of August, 1838, was not acknowledged and delivered until the 31st of October, 1839, twenty days after the deed of Henry Clay and wife to the McRees, was dated and acknowledged.—(Record, pp. 58 and 70.)

It further appears in Sam. McRee's bill in equity that Henry Clay had sold the O'Carroll N. M. location to Wm. McRee in his lifetime, and prior to the 4th of July, 1836.—(Record. p. 64.)

It further appears that Henry Clay, executor of Morrison, on the 10th of May, 1833, (Record, p. 56,) had vested in him by a decree of a court of equity, in St. Louis county, all the titles of the heirs of Hertzog and Wilt, being the parties then having an interest in the O'Carroll location, by reason of the decree of 1821 being void; so that, in fact, all the interest in the O'Carroll location was vested in Henry Clay, executor of Morrison, on the 10th of May, 1833, and all the interest of Henry Clay, executor, as aforesaid, was vested in Wm. McRee in 1836, by force of

the relation from the deed of 1839 to the contract of 1836, and all the equitable interest that existed in the New Madrid location of O'Carroll was vested in Samuel McRee in 1838, when he dated the deed of himself and wife to Pierre Chouteau for the land in suit, which was acknowledged and delivered on the 31st of October, 1839, twenty-days after Sam. McRee held all the equitable rights and titles that existed by force of the deed and said decree of 1833.

If proper weight had been given to these considerations and facts in the court below, the equitable title to the land in suit would have been held by the court to have vested in P. Chouteau, jr., in 1839, and that the legal title, by force of the relation of the patent to the date of exchange and location, became vested in Mr. Chouteau on the 14th of August, 1841, for the land in suit.

In this view of the case the doctrine of relation and the operation of the statute of limitations, either under the relation or on the equitable title, need not be invoked, and the defendants would stand before the court as holding the title to the land in suit by a deed for it from the grantor and devisor of Mary McRee, through whom plaintiff claims title.

7th. The deed of Samuel McRee and wife to Pierre Chouteau, delivered 31st October, 1839, conveyed all the interest, legal and equitable, that existed in favor of O'Carroll, or Wilt, or Henry Clay, prior to the return of the survey in August, 1841. On the 31st October, 1839, the deed of McRee and wife to Chouteau took effect, without regard to its date.—(Rev. Code of Mo., 1835, title, Conveyances; *Osterhaus vs. Schumaker*, 3 Hill, 517; *Oatman vs. Walker*, 33 Maine R., 67; 2 Hilliard R. Prop., p. 282; *Chase vs. Chase*, 1 Penn., 32.)

On the 31st October, 1839, Samuel McRee owned all the interest, right, and title in the New Madrid location, or equitable claim, and his bill in equity of 1844, to cure

the irregularity in the old decree of 1821, did not enlarge or affect his equitable interest in the New Madrid location; it merely prevented the alleged irregularity from affecting the equitable title or interest he had already acquired on the 4th of July, 1836, and on the 11th of October, 1839.—(Record, pp. 58, 59.)

Samuel McRee was, therefore, competent to convey and assign his equitable interest to Pierre Chouteau, jr., for the land described in the deed delivered on the 31st October, 1839, as part of the O'Carroll location, and the proceedings of McRee in 1844, to cure prior irregularities, and affirm his equitable title of 1836, will be presumed to have been for the benefit of his grantee and assignee, Chouteau, then, and for a long time before, and ever since, in possession of the *locus in quo*, as his and his devisee's coterminous proprietor, by division fences with improvements far more valuable than the land in 1839.—(Rev. Code Mo., 1845, title, Conveyances, Ejectment, Limitations; *Paprin vs. Massey*, 27 Mo., 452.)

In determining who has the better equity in this case, the deed of Samuel McRee, delivered 31st October, 1839, to Chouteau, is conclusive against his devisee as to all equities then vested in McRee. He then had all equities, claims, and rights to the New Madrid location that existed, and his bill in equity of 1844 is a solemn admission of record, binding on his devisee, that he was the owner of all the said equities, claims, and rights in 1836, and in 1839.—(Record, p. 61 to 69.)

8th. The patent of 10th June, 1862, to Mary McRee, assignee of J. Y. O'Carroll by deraignment of title, does not vest any new title in her as Mary McRee, but vests the old original title under the New Madrid location, and she takes as devisee of Samuel McRee, and not otherwise.—(New Madrid Act, sec. 3, 1815.)

The patent must issue on the patent certificate according to law, and if any such operation can be given to the patent as plaintiff claims for it, it would be void—(*Stod-*

dard vs. Chambers, 2 How., U. S., 285; *Cunningham vs. Ashley*, 14 How., U. S., 377; *Easton vs. Salisbury*, 21 How., 426; *Bissell vs. Penrose*, 8 How., 317, 344; *Lafayette's Heirs vs. Kenton*, 18 How., 197; *Strother vs. Lucas*, 12 Peters, 410; *Landes vs. Brant*, 10 How.; *Storrs vs. Stark*, 6 Wallace, 417, 418; *Rector vs. Ashley*, 6 Wallace, 182.)

A bold attempt has been made by plaintiff to manipulate the land offices and the land officers, so as to cut off all the equities preceding the date of the patent in 1862. So far as the surveyor general and recorder of land titles at St. Louis, the Commissioner of the General Land Office and Secretary of Interior, in Washington, in 1862, are concerned, the plaintiff used them as wax in his hands, and the obvious design of all the proceedings was to set aside the location of 1841, and make a new one of 1862, so as to commence the title as of the date of the patent. All that stands in the way of this official iniquity is the act of Congress of 1815, and this court. If the plaintiff has succeeded in this manœuvre, and the original location of 1841 has been lawfully annulled, then the patent is void under the authorities above cited; but he has failed, because his proceedings were too late, and the law compels the title to pass to O'Carroll and his legal representatives, and to Mary McRee as the legal representative of O'Carroll, and the original location must be upheld by the court, in order to give effect to the act of Congress, and prevent the destruction of a meritorious title by the malfeasance of public officers, and the manœuvres of this plaintiff.

By the old patent certificate of 1841, and the new patent certificate of 1862, it is declared "that James Y. O'Carroll, or his legal representatives, is entitled to receive a patent." The patent certificate of 1841 directed the patent to issue on survey No. 2,489; the supplementary certificate of 1862 directs the patent to issue on survey No. 2,498; but in both certificates the order is, to issue the patent to O'Carroll, or his legal representatives,

as required by the act of Congress of 17th February, 1815.—(Secs. 1 and 3, vol. 1, Pub. Land Laws & Inst., p. 255–6.)

The act gave no discretion to the commissioner, but required him to issue the patent to James Y. O'Carroll, or his legal representatives, according to the long established custom of the office.—(5 Mo., 147; Att'y General Wm. Wirt Opinion, May 11, 1820; 2 Pub. Land Laws, &c., p. 9; B. F. Butler's Opinion, May 7, 1836, vol. 2, p. 95.) The title must pass according to law, and by the act the patent must issue to the person named in the patent certificate. The commissioner's act is not at all conclusive, and this court has complete jurisdiction to determine in whom the title vested by force of the patent, and the law under which it was issued.—(*Lindsey et al. vs. Hawes*, 2 Black S. C., 554–6–7, and cases cited; *Dredge vs. Forsyth*, id., 569, 570; *Bryan vs. Forsyth*, 19 How., 338; *Witherspoon vs. Duncan*, 4 Wallace, 218; *Carroll vs. Safford*, 3 How., 460–1–2; *Stark vs. Starrs*, 6 Wallace, 418.)

The evidence is conclusive that Mary McRee had no other claim, right, title, or equity when the patent issued, except as legal representative of James Y. O'Carroll, under the will of Sam. McRee, who had conveyed to Pierre Chouteau; and this court will hold that the title by the patent vested in Mary McRee, as the legal representative of O'Carroll, in strict accordance with the patent certificate of 1841, and that such patent related back to the patent certificate and passed title to James Y. O'Carroll and his legal representatives, on the 16th August, 1841.—(See cases under the third point, and also *Witherspoon vs. Duncan*, 4 Wallace, 218; *Stark vs. Starrs*, 6 Wallace, supra, 418.

9th. The annullment of survey 2,498 is a singular blunder, if the plaintiff intended to have survey 2,489 annulled. As it appears of record, the two surveys, 2,489 of 1841, and 2,498 of 1862, represent precisely the same survey of the O'Carroll location, with the same lines, except-

ing only survey No. 3,183 for Cottard, within a survey for Mottard, which does not create any new interference with the O'Carroll survey. The plaintiff, in his anxiety to get a new survey and annul the old one, has procured the surveyor general to annul the new one of 1862, which left the old survey of 1841 in full force when the patent issued. —(Record, pp. 76, 74, and map marked page 98; p. 16, and map marked p. 20.)

To make sure work plaintiff procured Nelson, the recorder of land titles at St. Louis, to annul the patent certificate of 1841, as issued on survey No. 2,498. This act was in December, 1862, six months after the issue of the patent on the identical survey, 2,498 (Record, p. 16, and map marked page 20,) which Nelson and the surveyor general had decided to be annulled. On the 9th of January, 1863, the commissioner declares the patent certificate of 1841, issued on survey 2,498, to be annulled, and the Secretary of the Interior, on the 2d of March, 1863, affirmed the decision.—(Record, pp. 77, 78.)

All of these orders and decisions of the recorder, commissioner, and secretary are after the issue, delivery, and recording of the patent, and after the plaintiff brought suit in this case, against the defendant for the land, and are for that reason null and void, and without any effect. —(*Lott vs. Prudhomme*, 3 Rob. La., 293; 13 Lou. Ann. R., 128: *United States vs. Stone*, 2 Wallace, 535.)

The powers attempted to be exercised by these executive officers over a patent, sealed, issued, and delivered, only exists in courts of justice having jurisdiction in the premises.—(*id.*) All these acts are mere nullities.

10th. The patent certificate of 1841 remained in force, and the second certificate of 1862 did not affect the original certificate; the return of the survey before the 16th August, 1841, to the recorder, operated as an exchange, and perfected the title of the New Madrid location in O'Carroll or his legal representatives, and the patent was a mere form, and related back to the survey and patent

certificate of 1841.—(See cases above cited, and *Bryan vs. Forsyth*, 19 How., 337-8; *Dredge vs. Forsyth*, 2 Black., 569; *Witherspoon vs. Duncan*, 4 Wall., 218; *Carroll vs. Safford*, 3 How., 462; *Stark vs. Starrs*, 6 Wallace, 417, 418; *Taylor vs. Brown*, 5 Cranch, 253; *Mitchell vs. Handfield*, 33 Mo., 438; *Shaw vs. Cooper*, 7 Peters, 272; *Jackson vs. McCall*, 3 Cowen, 75; *Alexander vs. Merry*, 9 Mo., 524.)

For the other points of defence see the learned brief of John R. Shepley, Esq., my associate counsel in this case.

The judgment should be affirmed.

BRITTON A. HILL,
Of Counsel for Defendants in Error.

FEBRUARY 23, 1869.

IN THE

SUPREME COURT OF THE UNITED STATES.

Gibbons v Ogden.

Brief ~~Argument~~ for Plaintiffs in Error.

certificate of 1841.—(See cases above cited, and *Bryan vs. Forsyth*, 19 How., 337-8; *Dredge vs. Forsyth*, 2 Black., 569; *Witherspoon vs. Duncan*, 4 Wall., 218; *Carroll vs. Safford*, 3 How., 462; *Stark vs. Starrs*, 6 Wallace, 417, 418; *Taylor vs. Brown*, 5 Cranch, 253; *Mitchell vs. Handfield*, 33 Mo., 438; *Shaw vs. Cooper*, 7 Peters, 272; *Jackson vs. McCall*, 3 Cowen, 75; *Alexander vs. Merry*, 9 Mo., 524.)

For the other points of defence see the learned brief of John R. Shepley, Esq., my associate counsel in this case.

The judgment should be affirmed.

BRITTON A. HILL,

Of Counsel for Defendants in Error.

FEBRUARY 23, 1869.

No 102

Gibson v Thurlow.

Brief ~~Argument~~ for Plaintiff in error.

IN THE
SUPREME COURT OF THE UNITED STATES.

CHARLES GIBSON, PLAINTIFF,

vs.

CHARLES P. CHOUTEAU AND JULIA MOFFIT, DEVISEES OF PIERRE CHOUTEAU, DEFENDANTS.

STATEMENT OF THE CASE BY THE PLANTIFF.

On the 23d of September, 1862, the plaintiff brought an action of ejectment in the St. Louis Land Court, against Pierre Chouteau, and John Cook, and Charles P. Chouteau. Cook and Charles P. Chouteau disclaimed any interest in the land, and the action was abated as to them.

The plaintiff averred in his declaration or petition, that Mrs. Mary MacRee was, prior to the 20th August, 1862, invested by the United States with the title to said premises, and being so invested with the title thereto, conveyed the same to the plaintiff.

The petition states, and the answer admits, that the premises in dispute are a part of the U. S. Survey, No. 2498, in favor of James Y. O'Carroll, or his representatives.

The defendant (Pierre Chouteau,) in his answer denied "that on or prior to the 20th August, 1862, the said Mrs. Mary MacRee was invested by the United States with the title to the premises sued for, or seized thereof." And thus issue was joined on this averrment.

The said defendant also averred in his answer that he had been in possession of said premises for forty years, and that the plaintiff was barred by lapse of time and laches from any relief either in law or equity, and that the plaintiff held any title vested in him in trust for the defendant.

Both parties claimed under a New Madrid location certificate, in favor of James Y. O'Carroll, or his legal representatives.

On the trial of the case in the St. Louis Land Court, the plaintiff gave the following evidence:

1st. A patent by the United States to Mrs. Mary MacRee bearing date and issued on the tenth day of June, eighteen hundred and sixty-two.

The preamble to the patent recites that a certificate, (commonly called a patent certificate,) number four hundred and ninety-four, issued in pursuance of the New Madrid Act of 17th February, 1815, had been deposited in the General Land Office. It also shows that Frederick Bates, Recorder of Land Titles at St. Louis, on the 30th November, 1815, issued a certificate, (commonly called a New Madrid Location Certificate,) numbered one hundred and fifty, to James Y. O'Carroll, or his legal representatives, for six hundred and forty acres of land under said New Madrid Act. And that Joseph C. Brown for Christian Wilt, the legal representative of said O'Carroll, in said certificate located the same on the said tract on the 16th June, 1818. And that said Brown officially, as Deputy United States Surveyor, had made a survey of the same in 1818. And also, that there were several adverse claims to portions, but not all of said tract, and which are specifically mentioned in the patent.

The patent then grants the premises to Mrs. MacRee by name as the assignee of said O'Carroll, in virtue of deraignment of title from him. It contains the usual clause reserving "such valid rights as may exist in virtue of the claims particularly designated," as well as "any other valid adverse claims, if any such should exist."

2d. A deed by Mrs. MacRee to the plaintiff, dated, August 8th, 1862.

3d. The defendants admitted that Pierre Chouteau was in possession of the premises at the time stated, and the plaintiff proved annual value, &c.

The plaintiff rested here.

THE DEFENDANT'S CASE.

The defendant claimed to be the true owner of the equitable title upon which the patent was issued, and that the legal title conveyed by the patent to Mrs. MacRee enured to and vested in him as the true owner *pro tanto* of the certificate of location, and therefore legal representative of O'Carroll, and in support of his claim gave the following evidence:

1. Official documents (see record, page 98,) proving that James Y. O'Carroll claimed before the Board of Commissioners, one thousand arpens; that the Board on the 14th December, 1810, confirmed three hundred and fifty arpens, and ordered "that the same be surveyed as nearly in a square as may be, and so as to include his improvements;" that this confirmation was extended to six hundred and forty acres by the acts of Congress, of 3d March, 1813, and 12th April, 1814; that the six hundred and forty acres were injured by earthquakes; that the certificate No. 150 was delivered to James Tanner; that Tanner, as legal representative of O'Carroll, relinquished the six hundred and forty acres to the United States, and that Patent Certificate, No. 447 was delivered to Gen. Wm. Milburn, August 16th, 1841, under said Certificate No. 150 to O'Carroll, original claimant, U. S. survey, 2498.

2. Deed of O'Carroll to George Ruddell, (March 18th, 1809, conveys the whole tract.) There is no dispute as to this link in the chain.

3. New Madrid Certificate No. 150 in favor of "O'Carroll, or his legal representatives."

4. Location of the same on the premises by Christian Wilt, in due form of law, on the 8th November, 1816, and U. S. survey 2498. There is no contest about these facts.

5. Deed of George Ruddell and wife to Tanner and Gillispie, 7th March, 1816. This deed conveys "a part of the said tract of land, originally claimed before the United States Commissioners of land claims for the Missouri Territory, by and in the name of James Y. O'Carroll, as reference being had to the records of the record office, or fu land laims for the Missouri Territory; which "said tract of land has been materially injured by earthquakes, and whereas, "under the act of Congress of the United States, of the 17th February, 1815, "it is provided that person or persons owning lands in the county of New Mad-"rid, thus injured by earthquake, shall be entitled to locat certain quantities of "land of the United States,which they shall hold in lieu of ther injured, which "injured shall revert to and become absolutely vested in the United States, all "the privileges and benefits given to the said George Ruddell, and Theodocia,his "wife, by said act of Congress, which said claim has been regularly transferred to

"said George Ruddell, his heirs, hars and assigns. And the said George Rud-
"dell, Theodocia, his wife, are hereby sold and transferred to the said Tanner
"and Gillispie, thare heirs and assigns forever."

Then follows a covenant of warranty of the "bargained and sold premises, together with the privileges and appurtenances aforesaid."

6. Deed of George Ruddell and wife to George Dameron, 1st November, 1815, for "a certain part of a tract or parcel of land of two hundred arpens, situated in the Little Prairie township, lying and being in the county of New Madrid, and Territory of Missouri, and about two and a half miles from the village of Little Prairie, and adjoining part of the same tract sold by the said Ruddell to a certain William Rogerson, the lower side down a byo (bayou), and known by the name of James Young O'Carrell, head right, which said tract of land has been materially injured by earthquakes." It also conveys "all the rights and privileges and benefits, which are given to the said George Ruddell, by the said act of Congress," (of 17th February, 1815,) in virtue of the aforesaid tract of land.

7. Deed of George Ruddell and wife to Andrew P. Gillispie, 16th May, 1818. This deed conveys, "them tracts of land, parcels of land, situate in the county of New Madrid, and in Little Prairie township, one tract of two hundred arpens, situated on the Mississippi,or near the Misssissippi, it being a parte of James Y. O'Carroll settlement right."

8. Deed of Andrew P. Gillispie to James Tanner, 17th October, 1816. This deed conveys "all my (Gillispie's) right, title, interest, and claim of James Y. O'Carroll, and also, the claim of John Bakersign, of two hundred and fifty arpens, and the claim confirmed to George Morgin, which said clame, or a part of them, was bought in partnership by the said Andrew P. Gillispie and the said James Tanner."

9. Deed of Andrew P. Gillispie to James Tanner, 1st June, 1818. This deed conveys "all them tracts or parcels of land, one tract of two hundred arpens, a part of the settlement right of James Y. O'Carroll, situate in the county of New Madrid, and township of Little Prairie." It then describes another tract.

10. The deposition of Michael Brannan, a witness for defendant, who proved that O'Carroll lived about three or three and a half miles above Little Prairie; that he claimed a settlement right under the Spanish Government, which fronted on the Mississippi river, that there was a bayou about a mile and a half above the place known as the O'Carroll improvement, one about a mile below said improvement; one other back or west of said improvement some two miles, but cannot state that any ran through the tract. There might have been other bayous within the three above described—think there were some sloughs, but "nothing that we called a bayou." That Ruddell did not live on the place known as the O'Carroll improvement; he might or might not have lived on the O'Carroll tract; he lived about two miles from the improvement. He lived on the bank of a bayou, that he never knew George Dameron, did know Ruddell and his children, knew of no other settlement right of O'Carroll than the one mentioned, and that he lived in Little Prairie township from 1801 to 1820, and knew all the old settlers, unless it be some who lived there but a few days.

11. Deed of Rachael Dameron, William Wilson and John Dameron, to James Tanner, 2d October, 1816, for two hundred arpens, conveyed by George Ruddell to George Dameron. The grantors represent themselves in this deed as the legal representatives and heirs of George Dameron.

There is no proof that they were his heirs, other than the recital in this deed.

12. James Tanner to Christian Wilt, 31——1818. This deed conveys the lands the certificate. There is no dispute as to this link in the chain.

13. Deed of Chas. S. Hempstead, guardian of Geo. Wilson Wilt, to Joseph Hertzog, 10th September, 1821, under and in pursuance of the decree in chancery mentioned below.

14. Proceedings in chancery in Hertzog v. Wilt, purporting to authorize Hempstead to make the above deed. The plaintiff excepted to these proceedings, because the infant Wilt was not made a party to the same, the answer of the guardian was *pro-confesso*, and the decree on its face was rendered solely on the answer and bill, and not upon any evidence.

15. Deed of Hertzog to Wash, trustee, 26th October, 1822. This deed authorizes Wash to sell "at public auction upon giving ten days public notice."

16. Deed of Wash, trustee to Peter Chouteau, 27th November, 1824. The plaintiff excepts to this deed and sale, because it was made privately and without any notice, and not "at public auction, upon giving ten days public notice," and was made for the small consideration of two dollars per acre.

17. Deed of Hertzog, by sheriff, to Henry Clay, executor of Morrison, 17th May, 1825.

18. Judgment in Clay v. Hertzog and others.

19. Deed of Henry Clay and wife to Samuel MacRee and Ann and James F. MacRee, dated 11th October, 1839, acknowledged the same day, and filed for record, 2d June, 1840.

This deed recites that it was made "for and in consideration of the sum of five hundred dollars, heretofore paid to the said Henry Clay by Wm. MacRee, of the city of St. Louis, in the State of Missouri, now deceased," and it conveys the property to the grantees, to hold in the same proportion, as heirs and representatives of said William MacRee.

20. Deed of Ann F. MacRee and others to Samuel MacRee, July 4th, 1836.

21. Proceedings in chancery in Samuel MacRee, v. the representatives of Christian Wilt. The bill was filed in 1844, and the decree was rendered in 1848. These proceedings cured the errors in the proceedings of Hertzog v. Wilt's heir in 1822, and purport to vest the title in Samuel MacRee.

22. Deed of Samuel MacRee and Mary MacRee his wife, to Pierre Chouteau, Jr., "made 30th day of August, 1838," acknowledged, 31st October, 1839, and recorded, November 8th, 1839. Consideration mentioned in the deed, one hundred and fifty dollars. The grantors "bargain, sell, release, quit-claim and convey unto Pierre Chouteau, Jr.," the premises in dispute. As a part of the description, the deed describes the land sold as being "in the same parcel of land conveyed to said Pierre Chouteau, Jr., by Robert Wash, as trustee of Joseph Hertzog, by deed recorded in the recorder's office of St. Louis county, in book M, page 172, and following."

Mrs. MacRee for plaintiff, testified that Chouteau paid nothing for this deed, either to her or her husband. See page 88.

23. Copy from tabular list of Recorder of Land Titles showing confirmation to Joseph Calve's representatives of two by forty arpens in "F. 153 Field of St. Louis, B. Prairie." "Confirmed eighty arpens to be surveyed." Concession by St. Ange to Joseph Calve of two by forty arpens "situate in the Grand Prairie, bounded on one side by widow Mareschall and on the other side by the Little river." Here follows plat record page 97.

24. Copy of field notes of Joseph C. Brown, of said survey.

25. Certificate of Silas Reed as to plat of township 45. Plat record, page 98, with certificate of Mosberger, recorder of land titles, that this plat and the certificate of said Reed are correctly copied from said plat of township 45.

26. Charles P. Chouteau testified that Pierre Chouteau had been in the actual possession of the premises continuously since 1826, and Peter A. Berthold testified to the same thing, ever since 1830.

The defendant here rested, and the plaintiff then gave in evidence:

1. The certificate by United States Surveyor General, dated the 29th of April, 1863, annulling transcript plat of survey 2498, returned to the recorder of land titles by Silas Reed, on the 10th day of August, 1841.

2. A similar order by the recorder of land titles, made December, 1862.

3. Decision by the Commissioner of the General Land Office, affirming these orders, dated the 9th of January, 1865.

4. Decision of the Secretary of the Interior, affirming these decisions, made the 2d of March, 1863.

5. Instructions of the Commissioner of the General Land Office, of the 19th of March, 1847. The same instructions set forth in Fenn v. Holme, 21 Howard.

The defendants then gave in evidence:

1. The will of Samuel McRee, devising all his estate to Mary McRee, dated in 1845, and proved in 1849.

2. Patent certificate No. 494, in favor of "James Y. O'Carroll or his legal representatives," being the same on which the patent was issued. It excepts the rights of the adverse claimants, but does not prevent "O'Carroll or representatives from seeking a judicial settlement of his or their rights, if any exist, to said interferences."

W. T. Mason and R. V. Corcoran, plaintiff's witnesses, proved that Mrs. MacRee had purchased all the interest of all of the heirs of George Ruddell; part in 1856 and the remainder in 1859, but the plaintiff did not give in evidence these deeds.

The plaintiff also offered in evidence a letter from himself to Mr. Chouteau, proposing to exchange the title then held by him to the premises in dispute, for the plaintiff's title in Berthold v. McDonald.

On the trial in the St. Louis Land Court, the following instruction was given for the plaintiff:

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The effect of the patent issued by the United States to Mary MacRee, was to invest her with the legal title to the land in dispute; and the title vested in the plaintiff, through the deed to him from Mary MacRee, is superior to any title shown by the defendant to the land in question, under New Madrid certificate No. 150. And said patent having issued to said Mary MacRee, within ten years next before the commencement of this suit, the possession of said defendant is no bar to the plaintiff's recovery.

January, 1865. C. B. LORD.

The defendant asked the following instructions, all of which were refused, and exceptions duly taken:

The patent to Mary MacRee is void, and passes no title to her.

B. A. HILL, *for Def't.*

The recitals in the patent, that Mary MacRee is the assignee, by intermediate conveyances, of the title of James Y. O'Carroll, are not any evidence of that fact.

B. A. HILL, *for Def't.*

The patent is, in law, to James Y. O'Carroll and his legal representatives, and the plaintiff is bound to show her derivative title from James Y. O'Carroll, to entitle her to recover in this action.

B. A. HILL, *for Def't.*

122 All, and every of the orders, decisions, and acts of the recorder of land titles, of Surveyor General, the Commissioner and Secretary of the Interior, made after the date of the patent to Mary MacRee, as the assignee of James Y. O'Carroll, are null and void.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence that the survey of the said New Madrid claim for location, in the name of James Y. O'Carroll, was not returned by the Surveyor General to the recorder of land titles before the year 1841, then the said location is void, and the patent issued thereon is void.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find that the deeds and documentary evidence read in evidence by the defendant are genuine, then the defendant has shown a title to the land sued for in himself, if the said patent vests any title in James Y. O'Carroll, or his legal representatives.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence that the defendant, Pierre Chouteau, Jr., has had, and held open, notorious, and continuous possession of the premises sued for, claiming to own the same in his own right, and to possess the same adversely to all other persons for twenty years prior to the commencement of this suit, the plaintiff cannot recover in this action.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence that the defendant, Pierre Chouteau, Jr., has had, and held open, notorious, and continuous possession of the premises in question sued for, claiming to own the same in his own right, and to possess the same adversely to all other persons, for ten years prior to the commencement of this suit, the plaintiff cannot recover.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence, that Mary MacRee is the widow and devisee of Samuel MacRee, joining with his said wife, conveyed all his interest and title in and to the sixty-four acres sued for, to the defendant, Pierre Chouteau, by the deed acknowledged on the 31st
123 day of October, 1839, and filed for record on the 8th day of November, 1839, then the plaintiff cannot recover

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence that the patent given in evidence by the plaintiff was issued upon the claim for location in the name of James Y. O'Carroll, then the said patent enures to the benefit of James Y. O'Carroll and his legal representatives, and the plaintiffs cannot recover the land conveyed to Pierre Chouteau, Jr., by Samuel MacRee and wife.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence that the claim for the location in the name of James Y. O'Carroll, and the patent issued thereon and given in evidence in this case, covers any part of the field of the Barriere des Noyers, or the Cul de Sac, or the St. Louis commons, belonging to the town of St. Louis in 1812 and 1862, then the said location and patent are void.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence, that the patent issued on the claim for the New Madrid location, in the name of James Y. O'Carroll to Mary MacRee, covers in its whole extent land that must lie within and be contained within an outboundary line, run so as to include all the common fields and commons, field lots and village lots in, adjoining, and belonging to the town, now city of St. Louis, in 1812, then the said patent is void.

B. A. HILL, *for Def't.*

The patent to Mary MacRee, as assignee of James Y. O'Carroll, shows upon its face that the New Madrid location covers a portion of the St. Louis com-

mons, confirmed by the act of June 13th, 1812, and certain field lots in the Cul de Sac prairie, also confirmed to inhabitants of St. Louis, and that part of said O'Carroll's location, lying west of the St. Louis commons, is situated be-/tween the Barriere des Noyers common fields and the Cul de Sac field lots; and if the court, sitting as a jury, find from the evidence that an outboundary line so run as to include the Barrier des Noyers common fields and the
124 Cul de Sac field lots, on the 13th day of June, 1812, and also the out lots, common field lots, and commons belonging to the town of St. Louis on said day, would include the land in the O'Carroll location, then the said location is void, and the said patent is void.

B. A. HILL, *for Def't.*

If the court, sitting as a jury, find from the evidence, that when the patent read in evidence in this cause was issued, Mary MacRee was not the owner of the injured lands, in lieu of which the said patent issued, and that the sixty-four acres of land included in said patent and sued for in this action, was conveyed to said Pierre Chouteau, Jr., by Samuel MacRee, and Mary his wife, the grantor of present plaintiff, as a portion of the said New Madrid location; and if the court further finds from the evidence that the said defendant, Pierre Chouteau, Jr., has a derivative title by genuine deeds, given and read in evidence to the sixty-four acres of land sued for from the original location of the New Madrid certificate, in the name of James Y. O'Carroll, down to himself, then the plaintiff cannot recover.

B. A. HILL, *for Def't.*

The patent to Mary MacRee is only "*prima facie*" evidence of title in the said Mary MacRee, and the title to the land located by virtue of the certificate and patent, shall be determined according to the rights of the parties to the land, as located by virtue thereof; and if Pierre Chouteau, Jr., was the owner at the time of the commencement of this suit, of the sixty-four acres of land sued for, by virtue of good and sufficient deed or deeds, then the plaintiff cannot recover.

B. A. HILL, *for Def't.*

If Pierre Chouteau, Jr., acquired the land sued for of Samuel MacRee, and Mary, his wife, and said Mary, grantor of plaintiff, had no other title to the O'Carroll location than through the devise of her said husband, then Pierre Chouteau, Jr., was the owner of said land sued for, within the meaning of the 14th instruction, at the time this suit was brought.

B. A. HILL, *for Def't.*

Judgment was rendered by the Land Court for the plaintiff, and the case was taken by the defendant by appeal to the Supreme Court of Missouri, where the case was argued and submitted at the October term, 1866, when the said Supreme Court affirmed the judgment below. Thereupon the defendants moved for a re-hearing on the questions as to the effect of the deed of MacRee and wife to Chouteau, and also on the statute of limitations, which was granted on the effect of the decree in Hertzog v. Wilt, and on the question of the statute of limitations; and the case was again argued and submitted to the said Supreme Court, at the March term, 1867, whereupon the said Court reversed (without remanding,) the judgment below, and gave final judgment against the plaintiff, who thereupon brings the case here, by writ of error.

The Supreme Court of Missouri held in opinion number one.

1. That the deeds of Ruddell and wife given in evidence by the defendants, conveyed the *comfirmed* land, with the right of relocation appertaining thereto, and that James Tanner was the legal representative of O'Carroll, and conveyed all his interest to Christian Wilt.

2. That patent certificate, No. 447, issued in 1841, was valid, and the orders given in evidence by the plaintiff, annulling it, were void.

3. That the act of 26th April, 1822, did not apply to or affect this location.

4. That the patent to Mrs. MacRee was valid.

5. That it was properly issued to Mrs. MacRee by name as assignee of O'Carroll.

6. That the patent made a *prima facie* case. That the defendants might show that the patent was obtained by fraud, or issued without authority of law, or if valid, that it enured to their benefit as the true owners of the equitable title, but that they must show some title in themselves that would give them a standing in court, and enable them to call in question the validity or correctness of the documentary evidences of title emanating from the Government, and that the undertaking of the defendants to do this was a failure, for the following reasons:

1. The decree in Hertzog v. Wilt's infant heir was void.

2. The deed of Wash, trustee, to Chouteau was void.

3. The deed of MacRee and wife to Chouteau was a mere quit-claim, that they had no interest in the land when the deed was made, and that the interest acquired afterwards by them did not enure to Chouteau, under this deed.

That "the defendants had not even the equitable title, and that they were "reduced to the naked possession without the shadow of a title, and must therefore be considered, both in reference to the documentary evidences of title issued by authority of the United States, and in reference to the statute of limitations, as mere intruders."

7. That "the statute did not begin to run against the plaintiff before the date of the patent."

8. That a mere intruder could not dispute the correctness or validity of documentary evidences of title issued by authority of the United States, in pursuance of the acts of Congress.

9. That there was no evidence that the land would be embraced in the outboundary line, to be run under the act of June 13, 1812, and that until an official survey of such outboundary, including this land, is produced, the contrary will be presumed.

The judgment of the St. Louis Land Court was then affirmed.

The defendant's motion for a rehearing (record, page 108,) was confined to two questions, viz:

1. The statute of limitations:

2. The effect of the deed of MacRee and wife to Chouteau.

The rehearing was granted on two points only.

1. The decree in Hertzog v. Wilt's heir.

2. The statute of limitations.

In opinion number two, the Court adheres to the decision declaring the decree in Hertzog v. Wilt, void.

As to the statute of limitations, it held,

1. That the location made in 1841 did not operate "as an exchange to pass the title out of the United States," so that the statute would begin to run against the plaintiff from that time, that such a position was "directly antagonistic to repeated decisions of the Supreme Court of the United States," and was "wholly untenable."

2. That "it is well settled that no statute of limitations of a State can run against the United States, nor affect the grantees of the Government, until the title has passed from the proprietary sovereignty."

3. That no cause of action upon a right of entry by virtue of the legal title by patent, as such only, could exist until the patent issued.

4. That the right of action on the location alone, was distinct from the

action upon absolute title by patent, "and the one cause of action might be barred, and not the other."

5. But there was another principle upon which "the statute might *be made* to operate here as a bar to the plaintiff's action, and that is the fiction of relation whereby the legal title is to be considered as passing out of the United States, through the patent, at its date, but as instantly dropping back to the date of the location as the first act, or inception of the conveyance, to vest the title in the owner of the equity as of that date * * * * and so that the two rights of entry, and the two causes of action are thus by relation merged in one, and the statute *may be* held to have operated upon both at once," and that the patentee and her grantors had "an effective action for the recovery of the possession of this land, during all that time, while an adverse possession existed. This action was, by the statute, placed upon the same footing, and was equally effectual as if the party had all the while been invested with the legal title."

6. That "the statute has extinguished his (plaintiff's) remedy by taking away every kind of action," and upon these principles, the statute *is made* to operate as a bar to the plaintiff's action, "without coming in conflict, in any manner, with the decisions of the Supreme Court of the United States," or the regulations of Congress, &c., &c. (The italics are ours.)

7. That "the location as made in 1841 was not regarded by the Commissioners as wholly void; nor was the transcript plat entirely repudiated." That the return of the plat to the recorder, and the recording of it by him, are the acts which evidence the assent of the Government to the location, and make an appropriation of the land, "and that the location in 1841 was valid."

POINTS FOR GIBSON, THE PLAINTIFF.

Gibson's title in this case is identical with the title of the plaintiff in Bagnell v. Broderick, 13 Peters, 436. It consists of:

1. A patent of the United States to Mrs. Mary MacRee.
2. Deed of Mrs. MacRee to the plaintiff.
3. Proof of possession by the defendant, damages, &c.

I. The patent vested *prima facie* a perfect title in fee in Mrs. MacRee.

In the United States v. Arredondo et al., 6 Peters, 728, this court declares that "a patent under the seal of the United States or a State is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity."

See to the same effect, Philadelphia & Trenton Railroad Company v. Stimpson, 14 Peters, 458–9.

In Bagnell v. Broderick, 13 Peters, 436, this court held that the patent was "deemed to have been issued regularly, and we (the court) must presume that all the incipient steps had been taken before the title was perfected," and that the patent "merged the location certificate," that it was bound to presume that the patentee had "the superior right to obtain it," and having obtained it, he "had the best title (to-wit: the fee) known to a court of law;" and that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance, the fee is in the Government, which by the patent passes to the grantee, and he is entitled to recover in ejectment;" and that the States have no "power to declare certificates of purchase of equal dignity with the patent."

See Stringer v. Young, 3 Peters, 344; 6 Peters, 342; 7 Wheaton, 217; 24 Howard, 274; Hughes v. United States, 4 Wal., 236. 33 How., 248.

It is deemed unnecessary to multiply authorities on these points.

A reference, however, to Carmon v. Johnson, 20 Mo., 110, will show that the Supreme Court of Missouri fully approves these doctrines.

The plaintiff rested on the patent, and refused to go behind it, or give any evidence in support of it. His case is addressed solely to the law side of the court.

"Thus fortified stands the case of the plaintiff."

THE DEFENDANT'S CASE.

The defendants insist that this patent is void for the following reasons:

1. Because, as they claim, the act of the 26th of April, 1822, to "perfect certain locations," applies to this case, and that the patent does not show the plat of survey was returned to the Recorder of Land Titles within the time prescribed by that act.

2. Because the patent was made to Mrs. MacRee by name, and not to James Y. O'Carroll, or his legal representatives.

3. Because a correct outboundary line, under the act of the 13th of June, 1812, would, as they aver, include the premises in dispute.

4. Because other claims interfered with a part of the premises conveyed by the patent.

I. The defendants are "mere intruders," without the "shadow of a title"—mere "strangers,"and are, therefore, not in a position to make any objections to the patent.

1. The only interest which the defendants can pretend to claim as being vested *in themselves* to any part of the premises, is the claim set up by them as the owners of the "equitable or inchoate title" under O'Carroll, and on which the patent issued. This record fails utterly to show the slightest connection of either of the defendants with any portion of any one of the interfering claims. The defendants, therefore, can only set up those interfering claims as outstanding titles to a part, but not all of the premises, without any pretence of any interest in said claims vested in themselves.

2. The claim of the defendants to the "equitable title" under O'Carroll is derived through the following documents:

1. Decree in Chancery in Hertzog v. Wilt's infant heir.
2. Deed of Wash, Trustee, to Chouteau.
3. Deed of Samuel MacRee and wife to Pierre Chouteau.

III. The Supreme Court below held that the decree in Hertzog v. Wilt, and the deed of Wash to Chouteau, were "wholly ineffectual and void, for the reasons that the heir was not made a party to the proceedings and could not appear and answer by his general guardian only; that the trustee's deed did not show that the sale had been made in pursuance of the power given to sell; and that these documents described the located land, when the equitable title thereto did not exist at the time, nor until after the location was made in 1841." The court granted a rehearing as to the effect of the said decree, but in the second opinion it adhered to the first decision.

IV. As to the decree in Hertzog v. Wilt. No process was issued or served on either the guardian or ward. The bill was filed one day and the guardian appeared voluntarily the next day and filed an answer *pro confesso*, and the decree *on its face* proves that it was not rendered on any evidence or examination by the court, but *solely* on the answer of the guardian. We need not inquire what effect should be given to a decree purporting, however falsely, to be founded on evidence, or even a negative decree, not showing whether any trial was had or not. This decree is positively and affirmatively founded on the answer *pro confesso*. To give the least validity to such a decree is in effect to permit guardians to convey away the estate of their wards without the scrutiny or protection of a court; for the court in such a case examines nothing, determines nothing, and in fact, exercises none of the functions of a court of chancery.

Story's Equity Pleadings, s 44–58, n 3, 8, 70.
1 Dan. Chancery Practice, 229, 563, 164–5.
Heath v. Ashley, 15 Mo., 375.
Hendricks v. McLean, 18 Mo., 37.
Chalfant v. Monroe, 3 Dana, 35.
Ennis v. Cupps, 11 Illinois, 255.
Hamilton v. Gilman, 12 Illinois, 260.
Hough v. Doyle, 8 Blackford.
Chambers on Infants, 787.
Mills v. Dennis, 3 Johnson's Chancery Reports, 368.

V. As to the deed of Wash, Trustee, to Pierre Chouteau.

The power conveyed by the deed of trust of Hertzog to Wash, and under which this sale to Chouteau was made, required him to sell "at public auction, upon giving ten days public notice." His sale to Chouteau was private, and without any notice, and for the nominal sum of one hundred and twenty-eight dollars. The legal title could not pass, for it was then in the Government, and

no equitable interest could pass, for chancery utterly repudiates any such transaction.

VI. As to the deed of Samuel MacRee and wife to Pierre Chouteau.

A. When this deed was made, neither Samuel MacRee nor his wife had any interest in law or equity either to the land or the certificate. The deed recites that it was "made this thirtieth day of August, in the year eighteen hundred and thirty-eight," and the time when it was made is one of the facts "in testimony whereof," the grantors signed and sealed the same. In the testimonium it is expressly stated that Samuel MacRee and wife thereto "set their hands and seals *the date before written*," that is, the 30th of August, 1838. The deed was not acknowledged until the 31st of October, 1839—but the acknowledgment is no part of the deed, which is effectual *inter partes* without it, and in many cases is made many years after the execution and delivery of the deed.

Caldwell v. Head, 17 Missouri, 563.

B. Neither Samuel MacRee nor his wife acquired any interest in the premises prior to 1848, when the decree in chancery in his favor, against the heirs of Christian Wilt, was rendered.

1. The Sheriff's deed to Clay, executor of Morrison, was, of course, a mere quit claim, and passed nothing, for the only interest Hertzog claimed was under the void proceedings in Hertzog v. Wilt, above mentioned and commented on.

2. The deed of Clay and wife to Samuel MacRee, and others, in 1839, passed nothing, because it purported to convey the land only, and not the certificate, and describes the land as the same conveyed to Clay by the Sheriff. At that time the "location" had not become complete, so as to vest in the parties the "equitable title" to the land, and consequently nothing passed.

The proceedings in Samuel MacRee v. Wilt's heir, and others, in 1846, were not obtained by the means, upon the title, or at the instance of Chouteau. He was a total stranger to them. Those proceedings were no estoppel against him, and cannot so operate in his favor. All the authorities agree that an estoppel to be binding must be mutual. No mention is made in these proceedings, of Chouteau, or his claim of title. They were obtained by Samuel MacRee at his own cost, upon his own title, and for his own benefit.

C. Whether the title of Samuel MacRee originated in the deed made by Henry Clay to him and others, on the 11th day of October, 1839, or in the decree rendered in his favor, against the heirs of Wilt, in 1846, is immaterial, for in either case it was *acquired after* his deed to Chouteau.

The court below held that the after acquired equitable title to the location did not pass by this deed, either by virtue of the statute of the State, or by way of estoppel.

The defendants, in their motion for a rehearing, (p. 110), asked for rehearing on this point, but it was not granted. (See orders, p. 105).

1. This decision is in strict conformity with the doctrines settled by this court in Van Rensslaer v. Kearney, 11 Howard, 297, and French v. Spencer, 21 Howard, 228.

D. The operative words in this deed are, "bargain, sell, release, quit claim and convey."

In Frost v. Raymond (2 Cain, 190) it was held that the words "grant, bargain, sell, alien and confirm," in a conveyance in fee, did not imply a covenant or warranty of any kind, at common law; and this decision has been followed by all the standard writers.

4 Kent, 191.
Rawle on Covenants for Title, 471.
2 Hilliard on Real Property, 365.

The insertion of the word "quit-claim" is the most emphatic expression of the intention of the parties, and proves conclusively that they intended to convey such title as they then had, and nothing more.

The recital that Chouteau was in possession of the land, claiming under Wash, is wholly inconsistent with the idea that the grantors intended to convey anything more than such title, good or bad, as they then had.

It is well settled in Missouri that such a deed as this is a mere quit-claim, and does not operate to pass the after acquired title.

Bogy v. Shoab, 13 Mo., 38.
Valle v. Fleming, 18 Mo., 489.
Authorities cited by Mr. Hill in Picot v. Page, 26 Mo., 309.
See also Fink v. Darst, 14 Illinois, 305.
19 Vermont, 276.
Dart v. Dart, 5 Conn., 250.
1 Cowan, 616.

The consideration was nominal—only one hundred and fifty dollars. In fact, nothing was paid; (see testimony of Mrs. MacRee, page 88). It cannot, therefore, be affirmed that MacRee sold, or that Chouteau paid for a title in fee; the bargain as set forth in the deed negatives any such idea.

The question is not whether the operative words would be sufficient to pass the fee if the grantor had had it, but is there any obligation resting on the conscience of the grantor concerning the title? It is as competent for the grantor to quit-claim the fee as any other less estate. In Valle v. Fleming, (18 Mo., 489,) the words used were sufficient to pass a fee, but the deed was held insufficient to pass an after acquired title.

In Van Rensslaer v. Kearney, (11 How., 322,) this court fully recognizes the doctrine that where a deed "purports to convey and is understood to convey nothing more than the interest or estate of which the grantor is seized or possessed at the time," it "does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it."

This deed contains no warranty or covenant of any kind, expressed or implied. It certainly contains no covenant that the grantors were seized or possessed of any particular estate, nor does it purport to convey any such estate, either expressly or by necessary implication.

The defendants, in the court below, claimed that the recital in the deed from Clay to MacRee that it was made in consideration of five hundred dollars paid by William MacRee was evidence that Mr. Clay had made a title bond or agreement to him for the premises, but as the record is absolutely silent on this point, and as no such bond or agreement ever in fact existed, as far as is now known, the plaintiff does not deem it necessary to answer such a proposition in this court. The defendants are driven to this position in order to escape the operation of the statute of frauds Revised Statutes of Mo., 1835, page 284–89, title Fraud, and the effect of the decision of the Supreme Court of Missouri.

8. The decision of the Supreme Court of Missouri, (adhered to in both opinions).

First—That the proceedings in Hertzog v. Wilt, the deed of Wash, trustee, to Chouteau, and the deed of the Sheriff to Clay, executor of Morrison, were all 'wholly insufficient and void;" and,

Second–That the deed of MacRee to Chouteau passed nothing, and that the "after acquired equitable title" did not enure to Chouteau either under the statute of the State or by way of estoppel, is local, and therefore conclusive in this court.

A. The decision on these points does not "impugn" or "affect" the New Madrid certificate, or the location thereof, or any evidence of title or other act whatever, of any officer or agent of the Federal Government. It admits in its fullest extent the right of the grantee of the government to hold possession or dispose of the certificate, or the land. It is not that the "equitable title" did not "pass to and vest in" the vendee of the government, but on the contrary it declares that he had not disposed of it and still owns it. It is therefore "consistent with the admission that the title passed and vested according to the laws of the United States." (Wilcox v. Jackson, 13 Peters, 516). It is the duty and the right of this court to see that the obligations of the government to its grantee are carried out in good faith, but Chouteau is not the vendee of the government. It has no relations with him and is under no obligations to him. He claims this land through certain judicial proceedings in the State courts under State law, and certain deeds from private persons. The State courts can best interpret their own laws, and the acts of their own citizens and its Supreme Court has declared that the proceedings and deed are not sufficient to pass the equitable title. This is no concern of the National Government.

B. The certificate before its location, and the equitable title after it, was property, liable to be sold for debt under State law. (Landes v. Brant, 10 How.) Carroll v. Stafford, 3 How., 161.

Surely the State courts have the right to determine finally what effect shall be given to proceedings in its own courts, founded solely on State laws.

The State can impose no penalties, forfeitures or conditions, on the grantee of the Government. *His* rights are to be determined by the national tribunals; but when the State admits *in good faith* the rights of such grantee, it may "regulate the disposition of the property by descent, devise, or alienation." (Wilcox v. Jackson.)

This deed purports to convey the grantors' interest in *the land only*, and not the location certificate, or warrant. If the location was not approved by the Recorder until 1841, two years after the deed was *recorded*, then the grantors had no interest, legal or *equitable*, to the land when the deed was made, and if it did not pass the after acquired title it is necessarily wholly imperative.

Rector v. Ashley, 6 Wallace, 142.

inoperative

C. The State having passed a statute declaring what kind of a deed will pass an after acquired title, has, in effect, declared that no other kind of a deed shall so operate, on the principle *expressio unius exclusio alterius*. The court below declares that "the statute provision would seem to be the same in principle as the doctrine laid down in these decisions of the Supreme Court of the United States proceeding upon the idea of estoppel." We insist that this statute expresses the whole law on the subject in Missouri, that the State had a right to pass it, and that the decision below on it is to be adopted by this court.

See Jackson v. Chew, 12 Wheat., 162.

Henderson v. Griffin, 5 Peters, 155.

In Carroll v. Stafford, 3 How., 460, the following questions were put to this court by a divided bench below:

1. Whether a statute of the State of Michigan did in fact attempt to tax equitable titles.

2. Whether such titles could be taxed by a State.

And this court answered as to the first question, that the construction of the Supreme Court of Michigan of the statute was final in this court, and this court declares "that the courts of the United States adopt as a rule of decision the established construction of local laws. And it cannot be material whether such construction is established by long usage, or a judicial decision."

As to the second question, the court answered: That equitable titles were real estate, and that the "*conveyance of real estate, whether by deed or operation of law, is subject to the law of the State*, and that it is difficult to say that any restraint can be imposed on the local power on this subject." This case, under the decision of the court below, is conclusive against the defendant's claim to the equitable title.

In Irwin v. Marshall, Irwin was adjudged to be the immediate equitable vendee of the government. Chouteau is not the vendee of the United States. All the judges agreed in that case that the State or Territory might regulate the transfer of the equitable title after it had become vested in the grantee of the government, provided such regulations in no wise affected the rights of such grantee.

See Massey v. Papin, 24 Howard, 364.

To deny the States such power would be, in effect, to prohibit them, even in good faith and subject to all the rights of the national vendee, to have any jurisdiction over this kind of real estate, and which, in the new States, forms the bulk of the property of their citizens.

The National Government has made no statutory provision in such cases, and the local law is the only law to which recourse can be had for the administration of justice.

9. According to our view, the decision below, that the deeds from George Ruddell to Wilt's grantors were effectual to convey the *confirmed* land is final, but if we be overruled on this point, then we insist that the court erred in so deciding.

The location certificate was issued in lieu of the *confirmed* land. O'Carroll's claim was for one thousand arpens; his confirmations amount to only 640 acres. These deeds are for parts of the "claim."

The deed to Dameron was declared void in Holme v. Strautman, 35 Mo., 299.

No one of these deeds purport to convey any part of the smaller tract, being the *confirmed* land. The confirmation was "to be surveyed," and as these deeds are for specific parts of the "claim," the survey might or might not cover the land so conveyed.

Sanford v. Taylor and Corcoran v. West.

The defendants in order to prove that they are the representatives of O'Carroll must prove that their grantors owned the *confirmed* land.

The patent is proof sufficient for the plaintiff of this or any other fact necessary for its grant.

The right of relocation was appurtenant to the land, and conditioned upon the transfer of the injured land to the government, and as this could only be done by the owner, a transfer of the right without a conveyance of the land is void.

7. The legal title by patent does not necessarily enure to the person who may be ascertained to be the owner of the equitable title. This question was expressly reserved by this court, in Bagnell v. Broderick.

A. There can be no enurement at law in this case unless the case of Bagnell v. Broderick be overruled.

But for the statute of Missouri in relation to practice the defendants would be driven to a bill in equity. Bagnell v. Broderick.

The statute does not, and the State could not, in such cases, change the substantial rights of the parties, and therefore, although the defendants pray for equitable relief by way of defence, they are to be treated as urging that claim affirmatively; and this part of the defence is to be treated precisely as if the plaintiff had recovered at law, and the defendants had presented a bill in equity, asking it to transfer the legal title from the plaintiff to them, and to put him out of possession and put them in.

Carmon v. Johnson, 20 Mo., 110.

Hill v. Miller, 30 Mo.

B. Before the court will, by such a decree, interrupt the due course of law, it will examine the whole case, and all the relations of the parties to each other, and it will then determine whether the circumstances of each particular case are such, that the patentee should voluntarily make a conveyance of the legal title, and therefore shall be deemed as holding it in trust for the owner of the equitable title.

Courts of equity only do for parties that which they in common honesty ought themselves to do, and unless the party ought voluntarily to make the conveyance, the court will not decree that the title enures or vests in the person seeking the relief.

C. Numerous contests for legal title, by patent, are always pending in the land office. They last sometimes for a great many years, and possess all the attributes of *quasi* judicial cases. The ability and integrity with which the decisions in this department have been made fully justifies the great confidence reposed in them. Now we contend that when a party has obtained the legal title, not by the money of another person, or by fraud, accident or mistake, but when the patentee believes, and has good and sufficient grounds to believe that he or she is the true owner of the equitable title, and obtains the patent on the title so believed to be in him or her, then the patent does not enure. Where, for instance, two or more parties claim the patent, and a contest is carried on for many years before the Executive Department, each having good grounds to ask the patent, and it is finally granted to one party, has he gained nothing by his victory? Do the spoils belong to the victim or the victor?

We contend that in all such cases equity will only interfere upon some of the known grounds of equitable jurisprudence, such as fraud, accident or mistake, and in making its decree will examine all the relations of the parties.

D. Upon an examination of the record in this case, it will be found:

1. That Mrs. McRee claimed under deeds directly from the heirs of George Ruddell, and independently of any title devised to her by Samuel MacRee.

(Depositions of Mason and Corcoran showing these deeds were made to her.)

2. That the sale from Wash to Chouteau will be repudiated by a court of equity as corrupt—*malum in se.*

3. That his only other color of title is the deed from Samuel MacRee, and wife, which he obtained for nothing, and that during the lifetime of Colonel MacRee he laid no claim to his land, but shortly after his death joined in a suit against his widow "without the least semblance of justice" for her homestead, and prosecuted her through all the courts of the State and the United States. (Berthold & Chouteau v. McDonald & MacRee, 24 Mo., 133 How.) That during the pendency of this suit Mrs. MacRee gave the plaintiff, for defending her against Chouteau, these premises, and he of his own motion offered in writing to Chouteau to exchange the two titles. (See letter, page 90.) This offer was not accepted.

Under these circumstances Mrs. MacRee justly became the enemy of Chouteau. She had no relations with him and would not allow her attorney, even in defending a suit brought against them both jointly, to have any.

Such being the position of the parties to each other, she presented *her own* equitable title, and demanded the patent. That her claim was honest is proven by the fact that the St. Louis Land Court and the Supreme Court of Missouri both declared her's to be the only right to the equitable title. We deny that any man would feel himself bound in honesty to convey a legal title, thus obtained, to his enemy voluntarily and for nothing, or that a court of equity would compel such a conveyance, or transfer it by a decree, and consequently we deny that it would enure either at law or equity.

See Carman v. Johnson, 20 Mo., 110.

Miller v. Hill, 36 Mo.

10. The Supreme Court below held that Chouteau was "a mere intruder, without the shadow of a title," and therefore could not "question or dispute" the validity of the plaintiff's title, and that it had been so "uniformly held in Missouri."

In support of the decision on this point,
See Humter v. Hemphill, 6 Mo., 108.
Sarpey v. Papin, 7 Mo., 505.
Macklot v. Dubruiel, 9 Mo., 490.
Ib., 85, 91.
Boyce v. Papin, 11 Mo., 25.
Archer v. Bacon, 12 Mo., 155.
Swarts v. Page, 13 Mo., 611.
Mitchell v. Parker, 25 Mo., 34.
Robbins v. Eckler, 36 Mo., 506.

Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them.
Moore v. Wilkinson, 13 Cal. 487.

The same doctrine has been repeatedly announced by this court.
Beard v. Federy, 3 Wal., 486.
Dehon v. Burnel, Ib., 775.
Field v. Seabury, 19 Howard, 332.
Hale v. Gains, 22 Howard, 160.
Burgess v. Gray, 16 Howard, 65.

As the defendants fail to show any title in themselves, except such as is derived under this same location, the only effect of their success in proving the location void, would be to render them mere intruders, for they would destroy the very title under which alone they claim.

These objections do not appear upon the face of the patent, they are brought out in the defendants' case, and they are therefore reduced to this predicament. If they admit the location is valid, the patent carries the title and the case; and if they prove it to be void, they become mere tresspassers, and cannot defend against the patent, and will not be allowed to urge any objections to it, especially when the objections do not appear upon the face of the patent itself.

As to the patent being to Mrs. MacRee by name, and not to O'Carroll or his representatives:

A. The act of the 17th of February, 1815, provides that the patent shall issue to the party "in like manner as is provided by law for other public lands of the United States."

The act of May 18, 1796, (Dunlop's Laws of the U. S., 151,) is the general law on this subject. It provides that the "purchaser or his assignee or other legal representative, shall be entitled to a patent for said lands," and the President is authorized "to grant a patent for the said lands to the purchaser, his heirs or *assigns*."

B. The case of Baldwin's heirs v. Massey, 7 Wheat., 148, proves that patents may issue to assignees.

In Bagnell v. Broderick, 13 Peters, a patent precisely similar to this one to Mrs. MacRee, was not only held valid and effectual and a recovery had upon it, but the court declares it would have passed the title even if the certificate had been in the name of Byrne, the defendant.

C. The practice of granting location certificates under the New Madrid act to the original owner of the injured land or his representatives, and then issuing the patents in the same form, has produced infinite litigation, and has subjected the government to numerous and gross frauds.

The act provides that no one man shall exchange more than 640 acres, and yet it is known that one man obtained over thirty thousand acres by getting certificates in the names of the original owners, and then claiming under their various deeds to him. Mitchell v. Parker, 25 Mo., is a case in point. In that case *two* certificates had been issued for the same tract in New Madrid.

By granting the documentary titles to those proving themselves entitled to them, the government is protected from these frauds, and as the courts of equity are open to all injured parties the rights of all will be preserved.

D. Mrs. MacRee and her numerous vendees, (not represented here,) hold about 250 acres under no other than this title by patent, and it is clear that she obtained the patent mainly for the protection of herself and her vendees, and that the strip claimed by Chouteau was a mere incidental matter.

AS TO THE ADVERSE CLAIMS.

1. As to Calve's claim:

A. The defendants read in evidence a concession to Calve for a lot of two by forty arpens in the Grand Prairie, and then an *extract* from the official plat of township 45, showing a survey of this lot in the Cul de Sac Prairie. Had they given in evidence the whole plat aforesaid, it would have appeared that *two* surveys had been made under this same concession, one in the Grand Prairie and the other in the Cul de Sac. Upon refering to the case of Page v. Scheibel, 11 Mo., 173, it will be seen that Calve's representatives recovered and they still hold the lot in the Grand Prairie. The plaintiff objected to the admission of this evidence at the time.

The patent proves that the Executive Department regards the survey in the Cul de Sac as void, on the ground that there was no confirmation of the land in the Cul de Sac, that is, that the land conveyed was in the Grand Prairie, and not in the Cul de Sac. This claim is not even excepted out of the operation of the patent for this reason, as appears by the recitals in the patent itself.

B. As to the other claims, the patent contains only the usual clause reserving *valid* adverse rights; and this court has already decided that such a patent passes the fee *prima facie*, and gives the right to the patentee to contest these claims, and prove that his was the better right.

Dredge v. Forsythe, 2 Black., 569.

The location of these same Cul de Sac fields has been a matter of dispute for forty years past. The patentee claims the right to prove that they never had any existence at the place designated, and that this land was therefore vacant when the location was made.

Clark v. Hammerle and others, 36 Mo., 637.

The only question of law raised by the defendants on these claims is in the instruction which asks the court to declare the patent void in toto for all the land, because there were interfering claims for a part of it. That is, that the plaintiff having exchanged 640 acres in New Madrid county for a like quantity in St. Louis county, and having been so unfortunate as to lose his title to more than half of the new located land, he shall therefore lose the whole of it. Winn v. Patterson, 9 Peters, 680.

2. As to the outboundary line under the act of the 13th of June, 1812:

1. This outboundary line was run by William Milburn, United States Surveyor General, in 1840, and is commonly known as map X. Many millions of property rest upon it. It has been repeatedly ratified by all the proper officers of the United States, as well as by the Supreme Court of the State and of the United States. No portion of the premises in controversy is embraced within it. Nor was any proof whatever offered by the defendants as to what would

be the proper outboundary, or that any outboundary would include the premises in dispute.

Every presumption is in favor of the patent, and until some official action is taken by the United States, through its proper officers, the line already run cannot be disturbed, especially in favor of one resting on mere naked possession.

II.

The act of 26th April, 1822, does not apply to the New Madrid location on which the patent to Mrs. MacRee was granted.

1. The act does not apply to *all* New Madrid locations.

It does not prohibit in terms, or by implication, any officer of the government from perfecting locations made at the time of its passage. Its language and purport is applicable only to locations thereafter to be made, and it simply requires the "holders and locators of such warrants" to conform *thereafter* to sectional lines, and to locate their warrants within the time prescribed. It applies only to acts to be done in the then future by the parties "in locating," that is, in selecting the land under these warrants. It does not apply, nor was it ever intended to apply, to the powers, or limit the authority, of the officers of the government in perfecting the inchoate titles then existing.

The title forms no part of the act, but it is an aid in its construction. The title to this act is "An Act to *perfect* certain locations," &c. If the defendant's construction be true the act was an act to *defeat* certain locations, &c.

It provides that *hereafter* the holders and locators of such warrants shall be bound, &c., &c., and all *such* warrants shall be located within one year, &c.

In the case at bar the location on the surface of the earth was made and approved by the Surveyor General, and the survey officially made and approved by him three years before the passage of this act. The "holder and locator" of this warrant had done all that the law required him to do long before the passage of this law, and therefore it could not apply to him, nor did it purport to apply to him. We quote the second section entire.

"SEC. 2. *And be it further enacted*, That hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional lines of the public surveys as nearly as the respective quantities of the warrants will admit; and all such warrants shall be located within one year after the passage of this act, in default whereof the same shall be null and void."

When we consider that the act of February 17, 1815, was an offer of exchange by the United States to the New Madrid sufferers, that the United States was one party to this exchange and the owners of the injured land the other, and that this act was intended to limit the time within which this exchange could be made, nothing can be clearer than that this law was intended to apply only to those acts necessary to be done by the other party to the exchange.

These acts consist wholly of the proof of ownership and injury of the injured lands and relinquishment of the same to the United States, obtaining a certificate of new location, the application or location of this certificate on public land authorized to be sold, and a survey of the same with notice to the Surveyor General. *All* these acts were done before the passage of this law, in the case under consideration.

The law applies to the "holders and locators of such warrants." Now the officers of the government are neither holders nor locators of such warrants, and it cannot therefore apply to them.

A.

The word *locate* is used three times in this short sentence. First: it is applied to the person—the "holders and locators of such warrants." That undoubtedly means the owners of the warrants. Then it prescribes what shall be done by such "locators" "in locating" the warrants. This clearly applies only to the duty of the "locators"—the owners—in selecting the lands to be appropriated to the satisfaction of the warrants. The acts here prescribed form no part of the duties of the officers of the government. Then it is used to fix the time in which these acts shall be done. Nothing can be clearer than that the word is here used in the same sense throughout, and no reason can be given why every grammatical rule of construction should be violated in order to give to the word two different and wholly dissimilar meanings in the same short sentence.

The word is not here used to describe the place where the warrants shall or shall not be located, nor as describing what a "location" is, under the act of 17th February, 1817. None of the reasons given in Bagnell v. Broderick for making the assent of the government through the Recorder of Land Titles an essential and integral part of the "location" apply here, for the term is used here only to designate the "holders" of the warrants, to prescribe their duty, and fix the *time* within which they shall act.

Webster defines the term thus:

"Located—placed; situated; fixed in a place. Locating, placing; designating the place of."

Location. The act of placing or of designating the place of. Now it was no part of the duty of the officers of the government to give locality to floats. Their action commenced after the "act of placing or of designating the place of" the warrants by the holders and locators. Again, the act provides that all such warrants shall be "located," &c. Now the warrant does not locate itself. By whom shall the float be fixed to a designated place? Clearly by the locator —the owner.

The representatives of O'Carroll having accepted the offer of exchange and relinquished the land in New Madrid to the United States, and having done every act required of them to be done in order to perfect the exchange, and the United States having continued to claim the injured land so relinquished to them, it is not in the power of Congress to defeat the title of the plaintiff by declaring that *its* officers should perfect the grant within a specified time or it should be void. While it is true that courts have no power to command the government to do justice in such cases, they will recognize the validity of justice when it is done and sanctioned by the Executive Department, under such circumstances as has been done here, by perfecting the grant by issuing a patent.

3 Peters, 344.

36 Mo., 193.

Crews v. Burchan, 1 Black., 356.

In the case at bar both parties admit that the title to the New Madrid land was relinquished and conveyed to the United States, and of course the title to it was vested in the government and has remained in it, unless disposed of by it, ever since. Now if it be true that the new location was made void by this law, the United States would own both tracts of land and the owner of the location warrant would lose both, notwithstanding he had done every act and thing required to be done by him in order to perfect the exchange and his title to the new located land long before the passage of this law.

It is perfectly clear that if the government could be approached by a judicial writ, a court of equity would compel it to pass the title to the new located land to the holder and owner of the warrant, even if the law declared it void.

The court should conclude that the government intended such rank injustice only in cases where no other construction could by possibility be put upon its laws. In order to justify such a construction there should be not the slightest doubt as to the meaning of the law.

6 Peters, 733.

It is not the United States who are insisting that this patent is void. The government has done all it could do to the contrary. This construction is set up by a party who has no title, or color of title, and who never paid one dollar for the land to any one.

2. The construction which the appellant prays the court to give to this act, is flatly opposed to the decisions both of the Supreme Court of Missouri and of the Supreme Court of the United States.

The same point was presented in Cabanne v. Lindell (12th Mo. 184). There is no doubt that the facts of the case required the court to decide the question. While the judges differed on other points, they were unanimous on this point.

Judge Scott delivering the opinion of the court, says: "It is obvious from the words of the section above cited, that it was only designed to hasten the action of the claimants in selecting and having their lands surveyed, and could never have been intended to affect them injuriously for the neglect of officers over whom they had no control. If their lands had been located and surveyed" (as is the case at bar) "within the time prescribed by the act, it could not be contended that a failure in the officers afterwards to make a return would render the location and survey void, though it might delay an appropriation of the land."

Judge Napton, in his dissenting opinion, says the law applied to "subsequent locations," that it is applied to the act of the party in selecting the land and not to acts of officers of the government, and then observes that "it is obvious that Congress designed no such rank injustice, that they understood a location to be the act of the locator, and not a matter depending upon the amount of business in the offices of the Surveyor or Recorder of Land Titles." This has been the settled doctrine in this State ever since, and has never to my knowledge been controverted.

See Pacific Railroad v. Lindell, 39 Mo., 344.

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This law, although national, is essentially local in its effect and operation, and peculiar weight ought, therefore, to be given to the decision of the local tribunals.

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In Gamache v. Piguinot, 16 How., 468, this court says it feels exceedingly indisposed to disturb State decisions in this peculiarly local class of cases, although it has the power to do so.

Let us now examine the decisions of the Supreme Court of the United States on this point.

In Stoddard v. Chambers, (2 How., 318,) the court lays down the doctrine that "had the entry been made, *or the patent issued*, after the 26th May, 1829, when the reservation ceased and before it was revived by the act of 1832, *the title of the defendants could not be contested.*" That is, the New Madrid location and patent would have been *incontestible.*

In this case, although Mr. Lawless, who was counsel against the New Madrid certificate, refers to the act of 1822, yet so far from putting such a construction upon it as is now contended, and which would have been completely fatal to the title he was opposing, he says (page 295), that "if the question were now between the United States and the locator there might, perhaps, be some ground for a liberal construction. It might be contended that the Surveyor General, who filed the location and surveyed it, being an officer of the United States, his act as against his principal ought, if possible, to be binding."

In Barry v. Gamble, (8 Mo., 96,) this court held that a patent issued in 1827 on a New Madrid location, made on the 13th June, 1818, was valid, and could not be impeached by one having no title under the United States.

This case was affirmed by the Supreme Court of the United States. (2 How., 51). The New Madrid location and patent were attacked unsuccessfully as being void under the act of the 26th of April, 1822.

In Mills v. Stoddard this doctrine is re-affirmed and the court says: "When that title (the Spanish grant) was barred by the lapse of time, *the government by issuing a patent would have sanctioned the New Madrid claim, and no one could have contested it, as between the government and the claimant no controversy could exist.* By the patent he only acquired what his certificate entitled him to. And the right thus made complete, could not have been affected by any act of Congress. The government might have withheld the patent on the ground that the New Madrid certificate had been improperly located; but that not being done, *the patent gave an indisputable title.*"

In Easton v. Salisbury, (21 How., 431,) the court was considering the case of a conflict between a New Madrid location and a Spanish grant. I argued the case, and endeavored in vain, to make a distinction between it and Stoddard v. Chambers, and Mills v. Stoddard. The court declare the New Madrid location void, "under the paramount claim of Bell," and say that "the location was not only voidable, but it was absolutely void, *as it was made on land subject to a prior right.*" The court then goes on to re-affirm the doctrine announced in Stoddard v. Chambers, and Mills v. Stoddard, that "had the entry been made *or the patent issued* after the 26th May, 1829, when the reservation ceased, and before it was revived, *the title of the defendants could not be contested.*"

I insisted in that case that as one patent had been issued to Easton, he could not have obtained another during that interval, and the court on this point says, that "whether the withdrawal of the patent might have been procured, or a new one instituted, it is not necessary to inquire. No such attempt was made."

C.

Evidently the court in that case must be understood as intimating that Easton's location was void *ad initio*, because the land was reserved from sale, and continued to be so reserved until after the time limited by the act of 1822. Any other construction would make the decision conflict with itself and all the other decisions on the subject. Be this as it may, the court certainly affirm the oft repeated doctrine that if the patent had issued from 1829 to 1832, while the land was subject to sale, it would have passed the title, and this makes the patent to Mrs. MacRee valid, for the location here is not "made on land subject to a prior right." The cardinal difference between the two cases is this: In Easton v. Salisbury the patent was attacked by one holding a valid adverse title under the government, and the land was not subject to sale when the location was made; while in this case the land was subject to sale when the location was made; also when the patent issued; and the patent is assailed by a "mere intruder."

In Hale v. Gains, (22 How., 160), the certificate or warrant was located on land in the Indian Territory, and not subject to sale. The location was rejected by the surveyor at the time. The incipient step in the location was made in 1838.

It is therefore totally different from the case at bar, as the incipient location and survey in this case were incontestibly legal and valid, and were then, and have ever since been recognized by all the executive officers of the government.

In these four several cases the Supreme Court of the United States have declared that it was competent for the officers of the United States to issue patents on New Madrid locations as late as 1830—*i. e*, between 1829 and 1832. And if the power existed then, of course it continued to reside in these officers at the time the patent to Mrs. MacRee was made. These decisions all in effect affirm the doctrine laid down in Cabanne v. Lindell.

D.

The uniform practice of the government officers in performing all acts necessary to complete these titles, for more than forty years, is proof of its true construction as claimed by me.

Pinckard v. Richardson, 17 Mass., 144. 1 Cranch, 299.

A long and uninterrupted practice under a statute is good evidence of its construction.

McKeer v. Delany, 5 Cranch, 22,

And will be adhered to.

Rogers v. Goodwin, 2 Mass., 475. 3 Pick., 317.

In this case the Executive Department has been acting under the statute for forty-five years, constantly issuing patents when otherwise right, in such cases as the present.

See letter of Recorder of Land Titles, filed herewith.

I have dwelt the longer on this point because of its importance to the pub-

lic. The title to ~~one hundred~~ *fifty to one thousand* acres of land in the west will be affected by a decision adverse to the views above expressed.

E.

There is no proof that the return of the survey of this location was made to the Recorder and approved by him after the time prescribed by the act of 1822.

The patent purports to be issued on a patent certificate "issued in pursuance of the act of 1815," and a "location" made in pursuance of said act. The patent is proof that all preliminaries to its grant were lawful and regular, and it therefore proves in law that this survey was returned and approved in due time. The defendants gave in evidence an extract from a tabular list of patent certificates issued in 1841, and they assume that the survey was not returned until that time. This certificate is proof that it was then returned, but it does not show that it had not been returned long before. It is as reasonable to suppose that it was lying in the office of the Recorder of Land Titles as in the Surveyor's office.

In any event, no such mere presumption can destroy a patent. Presumptions are always in favor of official acts.

Strother v. Lucas, 12 Peter, 437. 6 Peters, 728.

Philadelphia & Trenton Railroad Company v. Stimpson, 14 Peters, 458–9.

AS TO THE STATUTE OF LIMITATIONS.

The plaintiff being entitled to recover upon the documentary evidence, for the whole of the premises in dispute, the only remaining question is whether his action is barred by the statute of limitations of the State of Missouri, and the possession of the defendants.

I. The plaintiff's action is an action at law founded solely upon the "superior and conclusive evidence of legal title," conveyed by the patent to Mrs. MacRee. It is not founded upon the statute of the State authorizing an ejectment upon the equitable title. The court below held that these two causes of action were distinct, and the one might be barred and not the other.

In Fenn v. Holmes, 21 How., 488, this court had under consideration the *identical equitable title upon which the patent to Mrs. MacRee issued*, and it was there held that no action at law could be maintained on that equitable title, that the fee was still then in the government of the United States, and that it would by the patent pass to the grantee, and that the patentee would be "entitled to enforce the possession in ejectment."

These principles were affirmed in Hooper v. Scheimer, 23 How., 248, as the "settled doctrine of this court," and in this last case it is further settled that a State law authorizing ejectment on equitable titles "is only binding on the State courts, and has no force in the Circuit Courts of the Union."

On this state of the law the question is: Shall the plaintiff be barred of his right of action on the patent, for not bringing an action on his title by patent before the patent was made out and delivered to Mrs. MacRee, in 1862?

It was contended by the defendant's counsel below, that the completion of the location in 1841, operated an exchange of title out of the United States,

and therefore that the statute began to run from that date. The Supreme Court below, in opinion number two, in answer to this proposition, held that "no legal theory, no principle of law, was ever suggested, nor has been now, on which it was conceived that such a result could possibly take place." The court further held, that "it is well settled that no statute of limitations of a State can run against the United States, nor affect the grantees of the government, until the title has passed from the proprietary sovereignty," and further, that "no cause of action upon a right of entry by virtue of the legal title by patent, as such only, could exist until the patent issued," and that the two causes of action, the one by patent existing by the laws of the United States, and the other created by and existing only by force of the statute of the State, were "distinct in themselves and the causes of action have a different foundation. The possession of the same land is claimed in both, but by different rights, and if there were nothing more, the one cause of action might be barred and not the other."

The principles thus settled, after a second hearing and argument, establish the law in Missouri, and necessarily overrule the case of Gray v. Givens (26 Mo., 300).

Gray v. Givens was repugnant to a long series of decisions in Missouri.

See Hunter v. Hemphill, 6 Mo., 113.
Stevenson v. Smith, 7 Mo., 619.
Lewis v. Lewis, 9 Mo., 185.
Cabanne v. Lindell, 12 Mo., 186.
Landes v. Perkins, 17 Mo., 258.
Aubuchon v- Ames, 27 Mo., 95.

It is opposed to the decisions in other States.

Morris v. Thomas, 5 Binney, 79.
Pro. N. Six v. McFarland, 12 Mass., 236.
Runy v. Edwards, 15 Mass., 251–295.
Chiles v. Chalk, 4 Bibb., 554.
Hartly v. Hartly, 3 Met. Ky., 57.

It is, however; useless to examine the decisions on this point either in Missouri or other States. The question is strictly national, and the decisions of this court are emphatic and repeated, and must be considered as forever settling the proposition.

The only remaining question, if question it can be called, is *when* the legal title on which this action is brought emanated from the government.

The patent was issued on the 10th day of June, 1862, and the case was commenced on the 23d day of September, 1862, less than four months after the patent issued. The Supreme Court below held that although the patent was dated and delivered on the 10th day of June, 1862, and not before that time, yet by "a mere fiction of law," going upon reasoning "*somewhat* abstruse and technical" this patent was issued, in legal contemplation, to Mrs. MacRee, not in 1862, but on the 16th day of August, 1841, when the first patent certificate was dated. And that, although, the right of entry, upon which alone this action was brought, did not accrue until the patent was delivered to Mrs. MacRee, for the reason that the fee passed by and upon the delivery of the patent to her, and not before, and that "no statute of limitations of a State could run against the United States, *nor affect the grantees of the government* until the title had passed from the proprietary sovereignty," still by this "*somewhat* abstruse and technical" "fiction," she and her grantors had a perfect right of entry upon the title by patent, more than twenty years before she obtained it, while the fee on which this action is brought was still in the government, and during all which period, no court, State or Federal, had any power, legal or equitable, over the fee, or any power to require the Executive officers to make out and deliver the patent, or to decree the title. (Maguire v. Tyler, 1 Black.)

If such be a proper application of the doctrine of relation, it is well termed a "fiction," for the wildest flights of fancy can furnish nothing more baseless in fact. The adjudication must necessarily proceed not upon the realities of life, or the rights, powers or duties of the plaintiff's grantors, or their neglect to enforce their rights, but upon judicial sophistry unfounded in fact, and contradictory of every "legal theory," and "every principle of law."

The defendants contend that this decision is local and should therefore be adopted by this court. The only contest between counsel on this proposition will be as to the character of the decision on this point, we insisting that it is national and not local.

1. All questions relating to the emanation of the title from the government, whether they concern the preliminaries to the grant, such as surveys, plats, location, entries, &c., or the grant itself, whether by confirmation, patent, or act of Congress, as well as all the rights of grantees of the government, whether grantees of the equitable title or the full legal title, are national.

2. In Bagnell v. Broderick this court held that the "effect" to be given to a patent was a national question, under the control of Congress; now the very question here is as to the "effect" of this patent, and the time when the legal title passed to Mrs. MacRee.

The jurisdiction of this court to determine what acts of the government pass the legal title and what do not, and the connection or "relation" which the various steps in the title bear to each other, has never before been questioned.

The proposition is that the judiciary of each and every State may, each for itself, declare *when* the title passed from the government, and *when* the local statute began to operate on the legal title, and such decisions, however erroneous or conflicting, must be adopted by this court as local in their nature.

We deem it unnecessary to discuss such a proposition in this court.

AS TO THE QUESTION OF RELATION.

Where several acts are necessary to transfer a title, each bears a certain relation to the other. The patent is related to the inceptive title so as to cover the legal title and protect the vendee of the owner of the equitable title, as in Landes v. Brant; or to cut out an adverse title interposed between the equitable title and the patent, as in the common case of an elder entry and a junior patent, against a junior entry and an elder patent; or where there are two confirmations for the same land, as in Berthold and Chouteau v. McDonald and MacRee; but in all these cases the questions have been in contests between opposing adverse titles. No case can be found in which a title by patent was forfeited for not bringing suit before the patent was in fact delivered by the government to the patentee.

The doctrine as applied in the case at bar is simply to antedate the patent in favor of a squatter, and by this means to let in the local statute of limitations and pass the title. It is contrary to the decisions both of this court and of the Supreme Court of Missouri.

The whole doctrine is laid down in Stark v. Storrs, 6 Wall., 418, as follows: "When in fact the patent does issue, it relates to the inception of the right of the patentee, *so far as it may be necessary to cut off intervening claimants.*"

In Fenn v. Holmes this court held that the identical legal title which is the foundation of this action was then in the government of the United States. This court puts the very question, "who holds the legal title to the land in question?" and answers it by declaring that it still remains in the "original owner, the government, until it is invested by the government in its grantee," by the patent, and that the grantee may "enforce the possession in ejectment."

Notwithstanding this decision on this very title, it is now declared that the legal title was not in the government and was under the control of the courts, and suit might have been brought upon it many years before the case of Fenn v. Holmes was brought. The decision in Fenn v. Holmes assumed that Holmes was the owner of the equitable title. The question therefore is this: When this court has declared that the owner of this same equitable title could bring no action at law upon it until he got the patent, shall he forfeit his land for not bringing such suit?

Suppose Mrs. MacRee had brought an action upon this title by patent in 1841, could she have produced the patent in court to support her claim? Could she ever have produced the patent until 1862, when it first had any existence? The legal title could pass only by the patent, (Fenn v. Holmes and Hooper v. Sheimer,) and a court of chancery could not enforce the equity. (Maguire v. Tyler.) The doctrine of relation as here applied is to antedate the patent and forfeit the plaintiff's land for not enforcing his rights at a time when no court had jurisdiction to hear his complaint.

The record shows that Chouteau was one of the defendants in the several cases brought by Holmes, and therefore the case at bar, when coupled with Fenn v. Holmes, presents this most singular case of jurisprudence: A suit is brought against Chouteau on the equitable title, and judgment is given for him because the plaintiff could not sue without the patent. His (Holmes') vendee, obtains the patent and sues on it, and judgment is again given for Chouteau because the plaintiff did not sue on the equitable title. It certainly requires reasoning "somewhat abstruse and technical" to reconcile the two decisions.

In the decision below, the court held that the right to sue on the equitable title would not exist but for the statute of the State, and this is supported by Hunter v. Hemphill (6 Mo., 113.) The State could, if the defendant's position

be correct, impose such terms and prescribe such time as it chose on suitors under its own statute, and thus the grantees of the government would be wholly at the mercy of the local governments, and would be required to sue in State courts on inferior equitable titles, or lose their land, long before they got the patent, and yet it is said this is no injury to them!

In some States no such statutes exist, and in such States the patentee would be barred without even having the right to bring an action on the equitable title.

In Cabanne v. Lindell (12 Mo., 186) it is held that if the title had not emanated from the government, the State could not "impose on him (the plaintiff) the necessity of bringing suit within a given time under penalty of losing his land" and that "the remedy offered by the State the claimant might use or not at his pleasure;" but in this case it is declared that the plaintiff has lost his land by exercising his "pleasure" in not suing on the inchoate title.

In Landes v. Perkins (12 Mo., 258) it is held that "until the title emanates the possession is not adverse, but under the government," and yet this possession is held to bar the title then held by the government.

In Aubuchon v. Ames, (27 Mo., 95) it is held that if a party "cannot sue or recover ON HIS TITLE because something remains to be done by the government to give him a right of action, time should not be counted against him in favor of an adverse possession."

In Stephenson v. Smith (7 Mo., 619) it is held that the State court when acting on cases founded on federal law "may be regarded as part of the judiciary of the Federal Government," and is "in fact discharging a portion of the functions of the General Government."

Now as the plaintiff's claim is founded on the laws of the United States and not of the State, and as he "could not sue or recover on his title, (by patent) because something remained to be done by the government to give him a right of action," can time be counted against him in favor of the defendant's possession?

Holmes was a citizen of Illinois, and had the right to appeal to the Circuit Court of the United States to enforce his claim to the land in question. He did make the appeal to it, and his suit was denied by this court on the ground that no action could be brought, and now the owner of the same title is barred for not bringing it.

Local interests will always beget local prejudices in favor of squatters. In some parts of the country political hostility to the United States will engender schemes to defeat rights claimed under the government, especially when set up by citizens of distant States.

If every State or Territory may by its statute give an action, miscalled an ejectment, under such impositions and restrictions as it sees fit, and then by another statute limit this action to such time as it may prescribe, and declare that if suit be not brought in the time fixed, the legal title, when conveyed shall *ipso facto and eo instanter* pass from the patentee to the squatter, then the disposition of the public domain would, by means of this "abstruse and technical fiction" be practically under the control of the local authorities, who,

by prescribing short periods of time in their statute of limitations, would give the land to their local intruders long before the government vendees would get their titles or have any right to "enforce the possession in ejectment," and the guarantee to purchasers from the government would amount to nothing.

The plaintiff's remedy under the State statute although called an ejectment, is, as the defendant's counsel insisted below, an equitable proceeding, and consequently the plaintiff's grantors *never* had any legal right of action, and yet it is held that he has lost his land for not suing at law!

At law the patent must prevail, and in equity the defendants cannot support their complaint solely upon the statute of limitations. Some confusion arises from the loose pleading allowed by the statute granting the ejectment, so called, on New Madrid locations.

The defendant by this statute is allowed the benefit of his equitable defence under the general issue as effectually as if he had filed a cross bill. If the defendants had filed their cross bill admitting the legal title in the plaintiff, it would appear clearly that they could not make the possession the basis of their suit in equity. This statute of limitations can be pleaded only at law.

Courts of equity refuse to grant relief when the claim is stale, but they do not divest the true owner of his title in favor of one who is a "mere intruder," relying solely on a naked possession.

The government in making this exchange was under obligations to see that the land should be given in fee to its grantee. That the title should not only pass to but "vest in" its grantee.

Before the title in fee has been conveyed to Mrs. MacRee, who is the real owner, Chouteau interposed himself between the government and its vendee by intruding into the possession, and he now claims the land under the statute of the State. The interest of a purchaser of land from the government cannot be "influenced" by State legislation. (Irwin v. Marshall, 20 How.)

The legal title in this case, if the decision below be correct, never did "*vest*" in Mrs. MacRee. It never did *vest* in any one who had any title to it under the government, but passed instantly through the grantee of the government and vested in a "mere intruder."

It is both the duty and the interest of the government to see that the title shall not merely pass to, but that it shall "vest" in its purchasers, and that they shall in good faith have, hold, and enjoy the thing itself, and that their rights shall not be influenced by any State legislation until after the title has been vested in them, and that State legislation first begins to operate on the title *after* it is *vested* in the purchaser. The doctrine of relation as held below directly conflicts with these doctrines.

Irwin v. Marshall, 20 How.

Wilcox v. Jackson, 13 Peters.

The doctrine of relation is an equitable principle to be applied only in favor of true justice. Now is it just for the government to hold the land of the plaintiff's grantors in New Madrid, and to give the new located land to a mere intruder, resting on a naked possession, who in fact paid nothing for the land, when the plaintiff's grantors have not neglected to enforce their rights under the patent as soon as it was issued, and as soon as any court had jurisdiction over it?

This location was an "exchange" between the United States and the plaintiff's grantors, that is a contract. Does the government perform its part of the contract by decreeing this land to one who is not its vendee, when its grantee has *never* had an opportunity to obtain possession, and has *never* sold, held or enjoyed the land?

I take pleasure in adding my testimony to the ability, energy and fairness of the bench by whom this decision was made. in all matters relating to mere private rights, but insist it committed error in deciding this point for the defendant.

The location was not completed until 1862 in such form as to authorize any legal proceedings upon it, even under the statute of the State.

The instructions of the Commissioner of the General Land Office, in 1847, lent the assent of the government to the location, but the same letter that gave the assent of the Department, rejected the patent certificate issued in 1841, and required the form of the survey to be changed, and of necessity a new patent certificate to be made out. It was not only competent, but highly proper for the Department to require the copy or transcript plat of the survey to show all interferences. In Bagnell v. Broderick, one of the reasons given for declaring that the location was not complete until the survey was returned, is that there might be adverse claims. These instructions are addressed to the *Surveyor General*, and they remit the transcript plat of the survey as well as the patent certificate issued on it, back to the *Surveyor General's Office*. So far from declaring the survey void or disturbing it, the Commissioner clearly approves the survey itself, but not the "transcript plat," i. e., the copy of it sent to the Recorder. This copy he requires to be made in a different form. This is the construction put upon it by the Department itself, for it required a new transcript plat and a new patent certificate to be made out before the patent to Mrs MacRee was issued. The patent shows on its face that it was not issued on the certificate made in 1841. In Fenn v. Holmes this court clearly intimates that the location, although assented to by the Executive Department, was then still *in fieri*.

It is immaterial to the public which of the parties shall be held to own this property, but it is of some public interest that the title should be settled in somebody, and therefore we pray the court to give such a decision as will forever quiet the title in one party or the other.

C. Gibson

J. D. McPherson
for Def't.

IN THE SUPREME COURT, U. S.

CHARLES GIBSON,

vs.

PIERRE CHOUTEAU, JR., rep.,

AND OTHERS.

CHARLES GIBSON,
vs.
PIERRE CHOUTEAU, Jr., *rep.*, AND OTHERS.

In the Supreme Court of the United States.

Brief for Defendants—Appellees.

The Defendants submit the following points and authorities:

I. The patent to Mary McRee, issuing, as it did, upon a patent certificate to John Y. O'Carroll, or his legal representatives, is a nullity, for

1st. It professes to be a proceeding under the New Madrid act, or some other act supplementary or explanatory. All those acts had expired, and no officer of Government had any power to dispose of lands under any one of them at the date of her patent. *Stoddard vs. Chambers*, 2 How, U. S. 285; *Cunningham vs. Ashley*, 14 How, U. S. 377; *Easton vs. Salisbury*, 21 How, U. S. 426; *Perry vs. O'Hanlon*, 11 Mo., 594.

2nd. If the several acts of location, viz.: The New Madrid warrant, the survey, and patent certificate, had any vitality and value, they did not belong to Mary McRee, but to Mr. Chouteau; and if they could be perfected into a title, that could only be done for the benefit of the honest and lawful owner. So far as the land in dispute is concerned, Pierre Chouteau was the owner of it, and of the New Madrid certificate covering it. It was his title that was patented, and the patent related back to the date of the location, and must be considered as dated then. It was his interest in said certificate that was surrendered and taken up at the Land Department when the patent issued. The whole consideration received by Government for said patent, so far as the land in controversy is concerned, moved from Chouteau. Mary McRee surrendered nothing; had nothing to surrender. The Plaintiff contends that certificate No. 150, and S. No. 2,498, were void as against the United States when the patent issued. Concede it: still they did not belong to Mary McRee; they could not enure to her: they were the property of Mr. Chouteau, and if for them the land has been patented, the

the Supreme Court of the United States held these words meant representatives of original owner by *contract* or *operation of law*.—2 *Wallace* 605. Now a title by adverse possession for ten years, is a grant by operation of law, and as good as a deed. Equally well settled has it been that it was the business of the *Courts* and not of the land *officers*, to decide who is the *legal representative*. This formula was adopted in order to leave that important question to the Courts. Such has been the universal understanding of the bar. No land officer has any facilities for trying the question. No one before ever attempted to try it. The decision of it in this case by a land officer, and the attempt to make his opinion conclusive is a bold manœuvre, fraught with nothing but tyranny, fraud, and all manner of injustice. If it succeeds in this case M. Chouteau will lose this land, worth $100,000, by the writing of two or three words falsely in a patent!

7th. If the patent merely conveyed the legal title, leaving Chouteau's equities outstanding, the plaintiff was not entitled to recover. No plaintiff can recover on a New Madrid title on a bare legal title. The plaintiff must have the *best equitable title also* or he has no standing in court. In 1839 the case of Bagnall vs. Broderick, was heard and decided.—13 *Peters*, 436. In that case, Robertson, who had owned the claim, sold and conveyed it. Eleven years afterwards he took a patent on the same claim, and this patent was set up against Robertson's vendee. A majority of the judges held that in an *ejectment in a Federal Court* the patent must prevail.—13 *Peters*, 450. Justice McLean dissented, insisting the fraud could be shown in the ejectment, *id.*, *p.* 451 *to* 458 *inclusive*. (See his opinion.) All the judges were of opinion that on the chancery side of the Court, the rights of Bagnall, the equitable owner of the location under Robertson's deed, could be set up—that is that the vendee of Robertson was honestly entitled to the land.

What was to be done? All the title papers in New Madrid cases were to some one, or his legal representatives. The Legislature of Missouri determined to open the door to equitable titles in these cases. So they passed an act declaring—(1.) That in a New Madrid case a patent should be only prima facie evidence, in an ejectment, of title in its grantee. (2.) That the title to the land located by a New Madrid certificate should be determined in an ejectment according to the equitable rights of parties, *Session acts*.—1838, 9, § 2 *and* 3. The revision of 1345 copied *p.* 442, § 12 *and* § 13. In 1849 the new code of practice was adopted, abolishing distinctions of pleading, in respect to law and equity. In 1855 the revision omitted the word "*equitable*," but again declared a patent only *prima facie* evidence in an ejectment: and provided the suit should "be determined according

to the *rights* of the parties to the land, meaning of course, to recognize *other rights* than those of the patentee. By virtue of this statute in actions of ejectment concerning New Madrid locations, a court of law has the same powers as a court of Equity.—10 *Mb. R.*, 260.

II. Whatever title Christian Wilt had to the New Madrid location, was, so far as the land in controversy is concerned, vested in Pierre Chouteau, either by deed of Wash to him, or deed of Chouteau to him.

In this branch of the case the following may be assumed to be admitted facts:

a. That all the title to the New Madrid location No. 150 was vested in Christian Wilt.

b. That, though vested in Christian Wilt, he held it only as trustee for the firm composed of himself and Hertzog; that Christian Wilt died in 1819, and that Hertzog, as surviving partner, had the title to the New Madrid certificate, and any land that might be located thereunder; that Christian Wilt left only one child, George Wilson Wilt (see deed of Hertzog to Wash, and McRee's bill in chancery).

c. That the title to the newly located land under New Madrid certificate No. 150, first became vested on the return of the survey to the Recorder of Land Titles in 1841.

It follows then, by the admission of all parties, that from the death of Christian Wilt, *apart from any proceedings in Court,* the equitable title to this New Madrid certificate, was vested in Joseph Hertzog, as surviving partner, and it was competent for him to sell it and any land located, or to be located thereunder, to any other person, and that person could, by filing a proper bill, obtain the title from the heirs of Christian Wilt, or such title as Christian Wilt originally acquired. ×

1st. *The effect of the deed of Wash and Devotion to Chouteau in 1822,* was to vest in Chouteau whatever title to the land in controversy Hertzog had.

Upon the supposition that the proceedings and decree of 1821, in the case of Hertzog *vs.* Wilt, are an absolute nullity—not only erroneous, but void—*still Chouteau acquired whatever title Hertzog had.* Hertzog, as surviving partner, having the perfect right to the New Madrid location, conveys it in 1822 to Robert Wash, to secure a large sum of money to Devotion, which was a debt due by the firm (see page printed record), with authority, upon default, to sell at ten day's "public" notice. Wash, on the 27th November, 1824, conveys this portion of the land thus conveyed to him, to Chouteau, reciting that the deed was made "by virtue of the power and authority in him vested by" said deed.

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3 Kent 64.

Now, what did Chouteau acquire by that deed ?

a. If no "public" notice was given, he held Joseph Hertzog's title precisely as Wash held it, and has been in possession as such trustee for the last 40 years.

b. If "public" notice was given, and the sale and deed made thereunder, then Chouteau acquired all of Joseph Hertzog's title to that land. We say, it sufficiently appears that this sale was made under the provisions of the deed of Hertzog to Wash.

The deed of Wash, it is true, does not recite how it was done; does not particularize how the notice was given, whether by newspaper or posting, or in what manner, but it does state that *it was made "by virtue of the power and authority in him vested by said Joseph Hertzog by a certain deed,"* &c., and that, as it has been proved that possession was taken under it at once, and from that time has been held undisturbed for 40 years, it *will be presumed*, under the recitals of that deed, that *the proper notice was given. 27 Mo., 452, Papin vs. Massey.*

Upon any theory then, even if decree be void, we have the legal title to whatever Joseph Hertzog owned, whether equitable or legal.

2nd. The decree in the case of Hertzog and Wilt's heirs is not void. We now come to consider the effect of the proceedings in the case of Hertzog *vs.* George Wilson Wilt, and the decree made in 1821 in that suit; and we shall attempt to show that, however erroneous they may have been, the decree was not void; that, however erroneous it may have been, it has never been avoided by George Wilson Wilt, or any one in his behalf, or claiming under him; and after 45 years with possession under it, cannot now be disturbed.

It is supposed to be void, because no process seems to have been served upon the minor, but he appeared only by guardian. While we admit this was irregular, we contend that the decisions of our own Courts, as well as others, show that a decree taken under such circumstances is simply erroneous and not void.

In the case of *Busland* vs. *Gales and wife*, 4 Dana, 430,-1, it is held that, although the guardian *ad litem* was appointed prior to any actual service of notice, that does not affect the question of jurisdiction, because, waiving other considerations, the subsequent ratification of it by permitting Ferguson to appear, and thus recognizing him as the appointed guardian, was a virtual appointment *de novo* and *nunc pro tenc*, and if not so, the judgment would only have been erroneous, and an erroneous judgment is valid till reversed, and though it vests no title, 20 years possession under it renders it sufficient evidence of a *prima facie* valid sale.

In the case of *Briston* vs. *Cowen*—5 Hump, 318—the infant was

not served with a process, but the regular guardian was served and answered. It was held that the decree was not void; that the purpose of serving process on the infant, is that the legally constituted person may appear and defend suit; that Chancery holds to forms no further than they contribute to the ends of justice, and the Court held that the decree was not void.

In the case of *Colwell* vs. *Bay*—8 Gill. and J., 136—it is said that it is the regular practice to summon infants before taking their answer; *but it is a mere irregularity not to do this.* An answer was put in for them, and no injury was sustained. The *decree* is not void; is not erroneous.

So also in the case of *Snowden* vs. *Snowden*—1 Bland, 550—that service of process on infants not necessary if guardian appears.

See, also, 4 Dana, 136; 3 Dana, 405, and 9 Dana, 391, *Downings heir* vs. *Ford*, to same effect.

In the case of *Day* vs. *Kerr*—7 Mo. R, 426—where there was no service on the minor, but there was an appointment of a *guardian ad litem* by the Court, and answer was filed by the guardian, and in that case, though as the answer was not by the general guardian, but by one appointed by the Court, on the ground that there had been no service, it was held that the appearance of the infant was a nullity, yet the Court said that it *does not follow that the appointment or decree is void.*

Infant must disaffirm, and this is quoted as being the law in *Hendricks* vs. *McLean*—18 Mo., 38.

3rd. If then, this decree is not absolutely void, Chouteau, by McRee's deed to him, acquired Hertzog's title, even if no title was conveyed by the deed of Wash.

It is assumed by the plaintiff that when McRee conveyed to Chouteau he had not obtained Hertzog's title; when we come critically to examine the deed, it will appear, beyond doubt or cavil, that McRee did have Hertzog's title. It is true that McRee's deed to Chouteau bears date 30th August, 1838 (see page), and that Henry Clay's deed to McRee and others, bears date and was acknowledged 11th *October*, 1839. Now, though the deed of McRee and wife to Chouteau was dated 30th August, 1838, *it was not acknowledged till the 31st day of October*, 1839, just 20 days *after* the deed of Clay to McRee. It is elementary law that *prima facie* a deed takes effect, and is supposed to be delivered at the time of acknowledgment.—*Oatman* vs. *Walker*, 33 *Maine R.*, 67; *Osterhaub* vs. *Shoemaker*, 3 *Hill*, 517. A deed takes effect from its delivery, and the recording of the deed is *prima facie* evidence of its delivery.—2 *Hillard's Real Estate, page* 282, *note a; Chase* vs. *Chase* 1 *Penn.*, 32. Here the deed was filed for record November 5th, 1839—28

days after McRee got all the title he ever had—because it was as owning the land under this deed, and only under this deed that he brought his bill against the heirs of Wilt and Hertzog.

So that, when McRee's deed was delivered to Chouteau, McRee had all of Hertzog's title in this piece now in controversy, that he ever had. If the decree was not void, that carried with it all the title that Christian Wilt ever had, equitable and legal; if void, then it carried with it the entire equitable title that Hertzog had as surviving partner.

4th. As then, when Clay acquired Hertzog's right to New Madrid certificate No. 150 and its equities, and conveyed the same to McRee, and McRee conveyed a certain interest therein to Chouteau, the title to the newly located land had not vested, and did not vest till 1841; the title thus acquired of Hertzog was that of entire ownership, and it required no bill in chancery to perfect it. This equity and imperfect title was *subject to sale under execution*. So held in *Landis* vs. *Brant, at page* 372, as to sale under execution.

So that this equity then existing and owned by Hertzog, as surviving partner, passed (supposing Chouteau acquired no prior title) to Clay under his execution. Then when the United States issues the superior and conclusive evidence of the legal title by its patent—that patent relates back to the inception of title.—*Taylor* vs. *Brown*, 5 Cranch, at page 253; *Landis* vs. *Brant*, at page 373, 10 How; *Mitchell* vs. *Handfield*, 33 Mo., 438.

So also, in case of *Shaw* vs. *Cooper*—7 Peters, 272. A patent issued in 1822. In 1829 it was surrendered for error, and a new one was then issued. It was held that this last patent had relation back to 1822.

In *Jackson* vs. *McCall*—3 Cowen, 75—*A* purchased premises at Sheriff's sale as property of *B*. *B* died, and B's devisee brought ejectment. After action brought, A got the deed from Sheriff, and the Court held the deed related back to time of sale.

—See also, *Boyd* vs. *Longworth*, 11 Ohio, 352; *Jackson* vs. *Dickinson*, 15 John R., 309; *Jackson* vs. *Raymond*, 1 John C., 85; *Alexander* vs. *Merry*, 9 Mo., 524.

5th. But if it be admitted that the decree in the case of Hertzog *vs.* George W. Wilt was absolutely void, and that Christian Wilt's title remained unaffected till the decree in the suit against Wilt's heirs and Hertzog's heirs brought by McRee in 1844, yet still we affirm that Chouteau has title under McRee, by virtue of the deed of McRee to him delivered on the 8*th November*, 1839, not by way of enurement, *but by way of estoppel*, against Samuel McRee and Mary McRee, and Charles Gibson taking title from Samuel McRee.

It is admitted that, until the survey was returned to Recorder of Land Titles in 1841, no title passed to the O'Carroll tract. What then was acquired by McRee by Clay's deed? Simply the New Madrid certificate No. 150—the right to locate. Having then that right, McRee assigns to Chouteau an interest in it for a valuable consideration. After having assigned this interest in it to Chouteau, the New Madrid certificate No. 150 is located, and the title vested for the first time, on the return of the survey in 1841. Then, after the title was vested, McRee thinks he discovers that he had only acquired the *equitable* title to the certificate and the land, and brings his bill against the heirs of Hertzog and heirs of Wilt, and in that bill *admits and grounds his petition for relief upon the following facts:*

First. That the equitable title to the New Madrid certificate No. 150 and newly located land was in Joseph Hertzog, as surviving partner of Christian Wilt.

Second. That Henry Clay had become possessed of that equitable title

Third. That Henry Clay had sold it to Wm. McRee, in his life time, and been paid for it (see page , and also at page , recital in Clay's deed). Wm. McRee, it appears from deed between his heirs at page , died prior to 1836.

Fourth. That Clay conveyed the land and certificate, so sold to and paid by Wm. McRee, after his death, by his deed of 1839, October 11th, and that the other heirs of Wm. McRee had conveyed their interest to Samuel McRee.

Fifth. That in this way, and *this way only*, he became the owner of the equitable title to the New Madrid certificate.

Now at the time he conveyed to Chouteau, McRee had the *equitable* title, and by the decree based upon this same equitable title he obtains the naked legal title. Under these circumstances can there be any doubt (however may have been the assignment of the interest in the New Madrid certificate, or quit claim to the land that might be, or have been located thereunder) that McRee, when he obtained the legal title through and under that *equity* which he possessed when he sold to Chouteau, held it for Chouteau as far as Chouteau's interest went? McRee by this decree *gets no new title.* He merely *perfects* that which he had when he conveyed a part of his interest to Chouteau, and gets it only by averring and proving that he held a complete equitable title to the land when he conveyed to Chouteau.

6th. Samuel McRee and all claiming under him are by the averments in his bill in chancery, estopped from denying that Joseph Hertzog was the owner as surviving partner of the New Madrid certificate No.

150, and any land that might be located thereunder and had a perfect title to the New Madrid certificate, or to any other chose in action belonging to the partnership and to equities that might attach to any land by reason of such ownership.

If therefore, Samuel McRee, at the time he conveyed to Chouteau, (which was after he had obtained all the title he ever had to this land as before shown), had and owned the New Madrid location, he by his deed to Chouteau, conveyed to Chouteau an equitable interest in the New Madrid location, to the extent of the land described in his deed to Chouteau, and Chouteau was the assignee of the New Madrid location to that extent.

III. The possession of Chouteau for more than twenty years since the return of the Survey in 1841, to the Recorder of Land Titles, and before the commencement of this suit, is an effectual bar to the plaintiff's right to recover.

In the great majority of instances of confirmations under the several acts of Congress, provisions are made in the act for patents to issue thereon. This is the case in relation to confirmations by the first Board of Commissioners. The act of Congress of the 21st of April, 1816, provides for a patent to be issued. It is so also as to lands located under a New Madrid location. Yet, as from early times the laws of the State of Missouri had allowed actions of ejectment to be maintained upon these titles without any patent having issued, the owners in the majority of instances have rested quietly without taking pains to procure a patent.

1st. As has been shown before, the title, as between the United States and the owners of the New Madrid certificates, became vested in the holder of the New Madrid certificate at the time of the filing the survey of the land located thereunder, in the office of the Recorder of Land Titles.—*Bagnall vs. Broderic*, 13 *Peters*, 448; *Barry vs. Gamble*, 3 *How*, 51; *Lesueur vs. Price*, 12 *How.*, 74; *Givens vs. Gray*, 26 *Mo.*, 300; affirmed in the decision in this case in the Supreme Court of Missouri.

2nd. Since 1825, ejectment would lie in the State Courts in favor of a plaintiff claiming under a New Madrid location, the survey of which had been so returned.—See Revised Statutes of Missouri of 1825, p. 234, 5, and subsequent acts.

The Supreme Court of the United States recognizes the validity of the laws of Missouri giving owners of inchoate titles the right to sue in ejectment.—*Magwire* vs. *Taylor*, 1 Black, page 202; *Holmes* vs. *Fenn*, 21 How, at page 488.

3rd. In Missouri there is no longer any distinction between law

and equity. No one can recover in an ejectment merely by virtue of a legal title.

As this Court is now re-examining the case as it came from the State Court, it must give effect to the rights of parties as they exist, or are affected by the practice of the State Courts.

This State practice forbids a recovery by the plaintiff, provided the defendant really has the equitable title to the land. The cause must be decided here, as it ought to have been decided in the State Court.

In the State Courts of Missouri, an equitable title to land under laws of the United States, is superior to the legal title under the same laws.

That is, there is neither law nor equity, but only the *right* which is recognized by the practice in Missouri.

4th. The survey having been returned in 1841, and Chouteau having taken possession, prior to that time, of this land under a recorded deed, and having had possession ever since under it, down to the commencement of this suit in 1862, adverse to plaintiff and those under whom he claims, the action of plaintiff is barred.—*Lindell* vs. *Cabanne*, 12 Mo., 184; *Givens* vs. *Gray*, 26 Mo., 300; *Clemens* vs. *Runkel*, 34 Mo., 41; *Bryan & Rouse* vs. *Forsyth*, 19 How, 334.

The statute of limitations had extinguished the equity of Mary McRee before the patent was issued to her. Whatever equity she had had passed to Chouteau by virtue of the statute. This Court has never held that a patent is a new title to the patentee at its date. The Court has always held that the patent enures to the owner of the claim in virtue of which it issued.

This Court has always conceded the power and duty of the State Courts to decide controversies arising between adverse claimants of inchoate equitable titles emanating from the general Government prior to patent. But if such actions may be brought at all prior to patent in State Courts, the power to fix the time in which they shall be brought is inherent. And a right lost by adverse possession under the statute, is as much lost as if the claimant had conveyed by deed. A grant presumed by lapse of time is as good as a grant proved by a conveyance. The simple question is, had McRee power to alien her right to this New Madrid warrant prior to patent. If she could have aliened her right so as to lose the benefit of the patent thereafter issued to her, then the mode of alienation is not material. It may be by deed, or it may be by a possession which, under a law of the State, has ripened into a title just as effectual and as perfect as if made by deed.—*Biddle vs. Mellon*, 13 *Mo.* 335. 3 How 462

The case of *Givens vs. Gray* is admitted to be decisive of this case

unless it be overruled, and the plaintiff holds that the case of *Holme vs. Fenn,* 21 *Howard,* 488 is entirely antagonistic to that decision and overrules it. This does not in the least affect this question. *It is simply a question as to the form of action.* At page 488 the Court says: "A "practice has prevailed in some of the States (and among them the State "of Missouri) of permitting the action of ejectment to be maintained "upon warrants for land, and upon other titles not complete or legal in "their character; but this practice as was so explicitly ruled in Bennett "*vs.* Butterworth (11 *How.*) can in no wise affect the jurisdiction of the "courts of the United States, who, both by the Constitution and by the "acts of Congress, are required to observe the distinction between legal "and equitable rights, and to enforce the rules and principles of decision "appropriate to each." That is, upon either a confirmation of the 1st Board of Commissioners, or a confirmation under the act of 1816, or holding under a New Madrid certificate, surveyed and returned to the Recorder of Land Titles (as the acts under which these respective titles emanated provided for the issuing of a patent) until that *conclusive* evidence of title issue, *the common law action of ejectment would not lie.*

The *radical defect* in the plaintiff's argument is that he denies that there is any *vesting* of title until the patent issues. No decision can be found that holds any such doctrine. On the contrary, all these decisions hold that *the title passed out* of the *United States* at the time the survey was returned. This is expressly asserted in all these cases. In the decision in *Fenn* vs. *Holme*, at page 488, declares only that because "the patent is the *superior and conclusive evidence* of the legal title in the Courts of the United States," the action of ejectment cannot be maintained without the patent.

IV. The Court has no jurisdiction of this case.

The question of limitation under the State laws is raised by the pleadings.

The facts to support it are in the record, and the law of the State made it the duty of the Court to hold Mrs McRees' right barred by time.

In such case the legal intendment is such was the decision.

GLOVER & SHEPLEY for Defendants.